BEFORE THE

House of Representatives

65th Congress, 1st Session

Election Committee, No._____

JAMES WICKERSHAM,
Contestant

vs.

CHARLES A. SULZER,
Contestee

Alaska Contest

BRIEF AND ARGUMENT FOR CONTESTANT

JAMES WICKERSHAM,
In propria persona.

PRESS OF THE SUDWARTH CO., WASHINGTON

D. of D.
JAN 13 1913

JK1359
65th
.A4W62

INDEX TO CONTENTS.

STATEMENT OF FACTS.

(1) The Candidates and the Result 3
(2) Suit of Sulzer *v.* The Canvassing Board 3
(3) Notice of Contest of Election, grounds stated 7
(4) Sulzer's Answer and Cross Petition 9
(5) Reply and Answer of Contestant 10

POINTS AND AUTHORITIES.

1. UNITED STATES ELECTION LAWS.

(1) United States Election Laws in States 10
(2) The power of Congress to govern a Territory 12
(3) United States Election Laws in a Territory 15
(4) United States Election Laws in Alaska 16
(5) Territorial Amendments to Organic Acts 20

2. SUIT OF SULZER *v.* THE CANVASSING BOARD.

(1) A suit to overcome Executive honesty 24
(2) Collusion and judicial partisanship 26
(3) Contestant not made a party 29
(4) A disqualified judge 33
(5) No mandamus against a Governor 35
(6) Relator's cause of Action 38
(7) An Arbitrary Decision 41
(8) Mandamus against the Board 44
(9) Another plain remedy at law 52
(10) What Judge Jennings decided, and why 55
a. Point No. 1.—Vault precinct rejected 55
b. Point No. 2.—Five other precincts rejected 59
(11) 37 non-resident soldiers voted for Sulzer 66

STATEMENT OF FACTS

(1) THE CANDIDATES AND THE RESULT.

There were three candidates for Delegate from Alaska to the 65th Congress at the regular election held in that territory on November 7, 1916. Lena Morrow Lewis received a total of 1346 votes; Charles A. Sulzer, the contestee herein, received a total of 6459 votes; and James Wickersham, the contestant, received a total of 6490 votes at said election. Within the time prescribed by law after the election the Territorial Canvassing Board met in the city of Juneau, Alaska, and proceeded from day to day to canvass and compile the returns of the said election.

That the said Canvassing Board, on the 1st day of March, 1917, completed its canvass and compilation of the returns of the election and that the official tally sheets showed the following result of the vote for Delegate to Congress from Alaska: Lena Morrow Lewis, 1346 votes; Charles A. Sulzer, 6459 votes, and James Wickersham, 6490 votes. That upon the completion of the canvass and compilation of the returns by the Board said Board voted to issue certificates of election to the candidates to the various offices who had received the greatest number of votes at said election as shown upon the official tally sheets.

(2) SUIT OF SULZER *V.* THE CANVASSING BOARD.

After the Canvassing Board, on March 1, 1917, had completed its canvass and compilation and had publicly and officially declared this contestant elected and had prepared his certificate of election for issuance, but before it was signed and delivered to him, Mr. Sulzer instituted a suit before the Judge of the District Court for the District of Alaska, Division No. 1, at Juneau, Alaska, praying for the issuance of a mandamus to compel the Canvassing Board to reject the returns from seven precincts, which added to the remainder, gave contestant a majority of all the votes cast at said election, but if rejected and thrown out left the contestee herein, Sulzer, with a majority. Sulzer's petition also demanded that the Canvassing Board be compelled to issue the certificate of election to him. No charge of fraud or other wrong doing was made against contestant, the electors, the election officers, or the Canvassing Board, but only the single allegation that the election judges had not made and sent in with the returns, from

the precincts named, a certificate showing why the Congressional form of ballots had been used in those precincts instead of the new form prescribed by the Territorial Legislature.

The Canvassing Board for the Territory of Alaska was then composed of the Governor of Alaska, Hon. J. F. A. Strong, the Surveyor General of Alaska, Hon. Charles E. Davidson, and the Collector of Customs, Hon. John F. Pugh, all of whom are Democrats, appointed by President Wilson and all political friends and supporters of Sulzer; all the election officers in Alaska were appointed by the precinct Commissioners, who were, in turn, appointed by the four Democratic district judges, who were, also in turn, appointed by President Wilson and confirmed by the United States Senate. The whole machinery in Alaska at that election was then and is now Democratic from top to bottom.

Upon the filing of the Sulzer petition, Judge Jennings, before whom it was heard, immediately and on the same day, issued an alternative writ of mandamus commanding the Canvassing Board to—

> "Reject and do not count the returns and the votes received and transmitted to you from the following precincts, to-wit:
>
> | | | | |
> |---|---|---|---|
> | Choggiung, | for | James Wickersham | 25 |
> | | for | Charles A. Sulzer | 3 |
> | Deering, | for | James Wickersham | 10 |
> | | for | Charles A. Sulzer | 6 |
> | Nizina, | for | James Wickersham | 7 |
> | | for | Charles A. Sulzer | 2 |
> | Nushagak, | for | James Wickersham | 10 |
> | | for | Charles A. Sulzer | 3 |
> | Utica, | for | James Wickersham | 13 |
> | | for | Charles A. Sulzer | 4 |
> | Bonnifield, | for | James Wickersham | 3 |
> | | for | Charles A. Sulzer | 1 |
> | Vault, | for | James Wickersham | 8 |
> | | for | Charles A. Sulzer | 2 |
>
> and that you issue a certificate of election of Charles A. Sulzer, the relator herein, certifying that he has been duly elected as a Delegate to Congress for the Territory of Alaska, at the election held on November 7, 1916."

or that the Board show cause for its omission to do so on March 3d before the said judge,

> "And you are hereby restrained from counting the votes or receiving the returns from any one or more of the precincts above named until the further order of this court."

Robert W. Jennings, the judge of the court before whom said cause was heard, was a candidate for Delegate to Congress from Alaska at the election held in Alaska on August 13, 1912, against this contestant, and was overwhelmingly defeated; he was fourth in the list and a poor finish at that; that John F. Pugh, the Collector of Customs in Alaska, and a member of the said Canvassing Board, is a brother-in-law of the said Judge Jennings, and both of said officials are partisan opponents of and very unfriendly to this contestant. That after the service of the said alternative writ of mandamus upon him, John F. Pugh appeared in court and filed his answer admitting all the allegations of the petition and writ and announced his readiness to reject all the ballots mentioned and to issue the certificate to Sulzer, but being only one of the said Canvassing Board of three he alleged he was powerless in the premises.

Thereafter and on March 6th, Governor Strong and Surveyor General Davidson, a majority of said Canvassing Board, made their answer and filed it in court before Judge Jennings, in which, among other things, they alleged:

> "1. That the Territorial Canvassing Board did, on the 1st day of March, 1917, complete its canvass and compilation of the returns of the general election held in the Territory of Alaska on the 7th day of November, 1916, and that the official tally sheets made up by said Board were duly totalled and checked, and that the same showed the following result of the vote for the several candidates for Delegate to Congress from Alaska: Lena Morrow Lewis, 1346 votes; Charles A. Sulzer, 6459 votes; and James Wickersham, 6490 votes.
>
> "2. That upon the completion of the canvass and compilation of the returns and the totalling and checking of the tally sheets of the Board said Board voted to issue certificates of election to the candidates for the various offices who had received the greatest number of votes in the said general election aforesaid as shown by the official tally sheets of the Board and that in pursuance of such action by the Canvassing Board and prior to the service of the alternative writ of mandamus upon the members thereof, a certificate of election was prepared by said Board for issuance to James Wickersham as Delegate to Congress from Alaska for the term beginning March 5, 1917; but that before said certificate had been signed and issued by the Board the members thereof were served with the writ of mandamus herein and no further action has been taken looking to the issuance of said certificate of election pending the further order of the court herein."

The Board of Canvassers also alleged that the returns from Choggiung, Deering, Utica, Nushagak, and Bonnifield precincts showed that the

Congressional form of ballots had been used in each of said precincts and that no certificate accompanied the returns from each of said precincts showing why such ballots had been used. But the answer also alleged that in the precincts of Deering and Utica the Board had been notified by telegraph from the Clerk of the United States District Court at Nome, in which division the precincts of Deering and Utica were situated, that the proof was then in his office and was being forwarded, made by the election officers in those precincts, showing why the Congressional form of ballots had been used instead of the form provided by the Territorial Legislature. The fact is, and the proof has subsequently been made, that in the precincts rejected by the alternative writ and finally by the peremptory writ, the territorial form of ballots did not reach the election precincts until after the election was over, and could not therefore be used. The electors used a form of ballot provided by section 9 of the Act of Congress of May 7, 1906, 34 Stat. L. 169 (172), which form is also provided for and made valid by the Act of the Territorial Legislature of April 27, 1915.

That a demurrer *ore tenus* was interposed by the attorneys for Sulzer to the answer of the Canvassing Board and argued before Judge Jennings, and thereafter and on March 20th the judge rendered a long opinion upon the law in which he held that the precincts mentioned should be rejected for the want of the certificate mentioned; thereafter a private citizen, Emery Valentine, a resident of Juneau, Alaska, filed with the Canvassing Board a protest against counting the votes from a large number of other precincts, then pending before the said Canvassing Board, for the same defects pointed out by Judge Jennings in his opinion as being fatal to the validity of the returns from the precincts rejected by him; that the Canvassing Board on said 21st day of March, 1917, filed the said protest with a statement, in the office of the Clerk of the District Court, and thereupon the clerk of that court brought the protest to the attention of the judge and upon the 22d day of March, 1917, Judge Jennings wrote a letter to the Governor and Surveyor General, a majority of the said Canvassing Board, in relation thereto, but nothing was done by the court looking to a consideration of any of the defects in the said record except those mentioned in the Sulzer petition.

That thereafter and on the 23rd day of March, 1917, and upon the pleadings in the cause, and without having heard any evidence whatever, Judge Jennings signed and issued a peremptory writ of mandamus, which contained the petition of the said Charles A. Sulzer as a part thereof, and which referred to the allegations of the answers of the

three members of the said Canvassing Board, and thereupon, and not otherwise, the said writ of mandamus ordered as follows:

> "Therefore, this is to command you and each of you, that upon receipt of this writ of mandamus you do forthwith convene as a Canvassing Board for the Territory of Alaska and that you reject the vote from the said precincts of Choggiung, Deering, Nushagak, Utica, Bonnifield and Vault and that you issue a certificate of election to Charles A. Sulzer as having received the greatest number of votes for Delegate to Congress from Alaska, and that said certificate be in the *usual form,* as by law provided. And this you are in nowise to omit. Given under my hand and the seal of this court this 23d day of March, 1917.
>
> "(Seal of Court.) ROBERT W. JENNINGS, *Judge.*"

Thereupon the writ of mandamus was immediately served upon the members of the Canvassing Board and on the 24th day of March, 1917, under the coercive mandate thereof, and not otherwise, the Canvassing Board rejected the votes and returns from Choggiung, Deering, Nushagak, Utica, Bonnifield and Vault precincts, and thereupon compelled by the mandate of the court issued a certificate of election to Charles A. Sulzer, and under judicial command, delivered the same to him. That thereafter and on April 3, 1917, Charles A. Sulzer presented the said certificate of election to the Speaker of the House of Representatives and took the oath of office as Delegate from Alaska and ever since has exercised the functions of the office.

(3) NOTICE OF CONTEST OF ELECTION—GROUNDS STATED.

That thereafter and on the 9th day of April, 1917, this contestant made, signed and served upon the said Charles A. Sulzer his notice of contest herein in which notice of contest he particularly specified the grounds upon which he relies in the said contest and served a true copy thereof upon Mr. Sulzer, in the House Office Building, in Washington, D. C., by delivering to him, personally, said true copy.

SPECIFIED GROUNDS OF CONTEST

The following is a brief statement of the grounds of contest specified in contestant's Notice of Contest served on the contestee, Charles A. Sulzer, in Washington, D. C., on April 9, 1917.

I.

Contestant received 6490 votes at the election for Delegate from Alaska, on November 7, 1916, and Sulzer, contestee, received but 6459

votes; that contestant received the greatest number of votes cast for any candidate for said office at said election, and was thereby elected.

II.

That on March 1, 1917, the Territorial Canvassing Board, after having duly canvassed and compiled all the election returns from said Territory so cast for any candidate for Delegate to Congress from Alaska duly and publicly declared that this contestant had received the greatest number of votes cast for any candidate for said office at said election, and was elected and entitled to have and receive the certificate of election therefor, and declare their intention of delivering the said certificate to him, this contestant, on March 2, 1917.

III.

That the suit of Sulzer *v.* the Canvassing Board, so begun on March 2, 1917, by the contestee herein, was without any authority of law and the proceedings therein and the judgment and writ were of no effect in law or equity; that the said court and the judge thereof were inequitable, unjust and partisan and said court was without authority or jurisdiction to compel the Canvassing Board to reject the said 69 votes so cast for this contestant in the precincts so rejected, or to compel said Board to give said Sulzer the certificate of election, and all such proceedings were void and in fraud of contestant's and the public's right.

IV.

Contestant objects to counting the returns from the precinct of Tokotna for the same reason that caused the rejection of those in Choggiung, Nushagak, Deering, Utica, and Bonnifield precincts.

V.

Contestant objects to counting the returns from the precincts of Juneau No. 1, Tokotna and Loring for the same reason that caused the rejection of those in Vault precinct.

VI.

Contestant objects that the returns from the precincts of Choggiung, Nushagak, Deering, Utica, Bonnifield, and Vault were rejected from the count in the canvass and compilation for Delegate from Alaska, but were retained and counted for all other officers voted for at said election.

VII.

Contestant objects to the action of the court and Canvassing Board in rejecting said 69 votes so cast for contestant at Choggiung, Nushagak, Deering, Utica, Bonnifield and Vault precincts, and asks the House of Representatives to count them for him.

VIII.

Contestant objects that 34 votes cast by soldiers and men enlisted in the United States regular army stationed at Fort Gibbon, Alaska, were counted for Sulzer, contestee.

IX.

Contestant objects that 4 votes cast by soldiers and men enlisted in the United States regular army stationed at Fort Egbert, Eagle, Alaska, were counted for Sulzer.

X.

Contestant objects that any ballots or returns shall be excluded or rejected from the canvass and compilation of the returns of said election for Delegate from Alaska for the alleged reason that the same are in conflict with Chapter 25 Sess. Laws Alaska, 1915, aforesaid, because said Territorial Legislature of Alaska did not have authority to alter, amend, modify or repeal the election laws so enacted by Congress in the Act of May 7, 1906, "An Act providing for the election of a Delegate to the House of Representatives from the Territory of Alaska."

(4) SULZER'S ANSWER AND CROSS-PETITION.

On May 9, 1917, Mr. Sulzer served a copy of his Answer and Cross-Petition in contest on this contestant. The allegations of fact in Contestant's Notice of Contest are substantially admitted, but the conclusions are denied. In his affirmative defense therein, in the nature of a cross petition or notice of contest, Sulzer alleges certain other irregularities in the election and in the official returns not stated in his petition for Mandamus before Judge Jennings, but he bases these charges of irregularities almost wholly upon the Act of the Territorial Legislature entitled "An Act to provide official ballots for elections in the Territory of Alaska." Sess. Laws Alaska, 1915, pages 55-66. But that Act being in direct conflict with the Organic Acts of Congress of May 7, 1906, and August 24, 1912, is void, and hence the arguments based on it fall with it.

(5) REPLY AND ANSWER OF CONTESTANT.

And on May 12, 1917, this contestant served his reply and answer on Sulzer, which amounts to a general denial of the allegations in Sulzer's answer, and thus the case is at issue. Contestant in his said reply and answer makes additional allegations by way of defense, but they do not, probably, necessitate any further pleadings, and the case is now ready for taking testimony under the statutes.

POINTS AND AUTHORITIES

1. UNITED STATES ELECTION LAWS.

(1). United States Election Laws in States.
(2). The Power of Congress to govern a Territory.
(3). United States Election Laws in a Territory.
(4). United States Election Laws in Alaska.
(5). Territorial Amendments to Organic Act.

(1) UNITED STATES ELECTION LAWS IN STATES.

The Supreme Court of the United States in the case of United States *v.* Gradwell, and other defendants, decided April 9, 1917, and not yet reported, gave an outline history of the enactment of election laws by Congress for the election of Representatives in the Congress of the United States.

> "The power of Congress to deal with the election of Senators and Representatives is derived from Section 4, Article I, of the Constitution of the United States, providing that:
> 'The time, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations except as to the places of choosing Senators.'
> "Whatever doubt may at one time have existed as to the extent of the power which Congress may exercise upon this constitutional sanction in the prescribing of regulations for the conduct of elections for Representatives in Congress or in adopting regulations which States have prescribed for that purpose has been settled by repeated decisions of this court, in Ex Parte Siebold, 100 U. S. 371 (1879), Ex Parte Clark, 100 U. S. 399, (1879), Ex Parte Yarborough, 110 U. S. 651 (1884) and in United States *v.* Mosley, 228 U. S. 383 (1915).
> "Although Congress has had this power of regulating the conduct of congressional elections from the organization of the government, our legislative history upon the subject shows that except

for about twenty-four years of the one hundred and twenty-eight years since the government was organized, it has been its policy to leave such regulations almost entirely to the States, whose representatives Congressmen are. For more than fifty years no congressional action whatever was taken on the subject until 1842 when a law was enacted requiring that Representatives be elected by Districts (5 Stat. at Large, p. 491) thus doing away with the practice which had prevailed in some States of electing on a single State ticket all of the members of Congress for which the State was entitled.

"Then followed twenty-four years more before further action was taken on the subject when Congress provided for the time and mode of electing United States Senators (14 Stat. at Large, 243) and it was not until four years later; in 1870, that, for the first time, a comprehensive system of dealing with congressional elections was enacted. * * * * It is a matter of general as of legal history that Congress, after twenty-four years of experience, returned to its former attitude toward such elections and repealed all of these laws with the exception of a few sections not relavent here.

* * * * * * * *

"The policy of thus entrusting the conduct of elections to state laws, administered by state officers, which has prevailed from the foundation of the Government to our day, with the exception, as we have seen, of twenty-four years, was proposed by the makers of the Constitution and was entered upon advisedly by the people who adopted it, as clearly appears from the reply of Madison to Monroe in the debates in the Virginia Convention, saying that:

'It was found impossible to fix the time, place, and manner of election of Representatives in the Constitution. It was found necessary to leave the regulation of these, in the first place, to the State Governments as being best acquainted with the situation of the people, subject to the control of the general Government, in order to enable it to produce uniformity and prevent its own dissolution. * * * * Were they exclusively under the control of State governments, the general government might easily be dissolved. But if they be regulated properly by the State Legislatures the Congressional control will probably never be exercised.' "

United States *v.* Gradwell, et al. Nos. 683, 684, 775, and 776, Oct. Term, 1916.

It has, then, been the policy of Congress for the greater part of our constitutional life as a nation, and now is, to leave the conduct of the election of members of the House of Representatives to state laws, administered by state officers, though Congress has the constitutional right of exclusive or supervisory control, and for twenty-four years exercised that right by positive statutes such as that of 1870. There is not now any separate federal system for the election of Representatives from

states: they are now elected in each State under the state election laws, controlled by the provisions of such laws and the State officials. The state election machinery is thus borrowed by the United States for its use in such elections and it adopts such laws by implication and use.

In Ex Parte Siebold, 100 U. S. 371, the Supreme Court of the United States says of this dual system:

> "That the duties devolved on the officers of election are duties which they owe to the United States as well as to the State, is further evidenced by the fact that they have always been so regarded by the House of Representatives itself. In most cases of contested elections, the conduct of those officers is examined and scrutinized by that body as a matter of right; and their failure to perform their duties is often made the ground of decision. Their conduct is justly regarded as subject to the fullest exposure; and the right to examine them personally, and to inspect all their proceedings and papers, has always been maintained. This could not be done if the officers were amenable only to the supervision of the State Government, which appointed them."
>
> Ex Parte Siebold, 100 U. S. 371 (389).

It follows that while Congress has paramount authority under Section 4 of Article I. of the Constitution to establish and maintain a complete and exclusive system of laws for the election of Representatives from the States, it does not do so but accomplishes its purposes quite as effectually by permitting the States to hold the elections under State laws.

(2) THE POWER OF CONGRESS TO GOVERN A TERRITORY.

Article I. Section 4, of the Constitution has no application except in a State, and no reference to conditions outside the territorial dominion of a State. This is quite clearly stated, in part at least, in the Siebold case. (The italics are mine.)

> "This concurrent jurisdiction which the national government necessarily possesses to exercise its power of sovereignty in all parts of the United States is distinct from that exclusive power which, by the first article of the Constitution, it is authorized to exercise over the District of Columbia, and over those places within a State which are purchased by consent of the legislature thereof, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings. *There its jurisdiction is absolutely exclusive of that of the State,* unless, as is sometimes stipulated, power is given to the latter to serve the ordinary process of its courts in the precinct acquired."
>
> Ex Parte Siebold, supra, (395).

That clause of the Constitution, Article I., Section 8, giving Congress power "to exercise exclusive legislation in all cases whatsoever" over the District of Columbia and the sites of forts, magazines, arsenals, dockyards, and other needful buildings in States, is not more exclusive in its grant than the power given Congress to enact legislation for the Territories. Article IV. Section 3, of the Constitution, provides:

> "That Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory or other property of the United States."

Whether the power of Congress to govern tthe Territories is based solely on this clause of the Constitution or requires also the support of other clauses is immaterial in this case, for the authorities are perfectly agreed that it exists and is plenary and paramount. The Supreme Court of the United States in the case of National Bank *v.* County of Yankton, 101 U. S. 129 (133), has stated the general rule applicable alike to Dakota and Alaska (italics mine):

> "All territory within the jurisdiction of the United States not included in any state must necessarily be governed by or under the authority of Congress. The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations. *The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities;* but Congress is supreme, and for the purposes of this department of its governmental authority has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution.
>
> "In the organic act of Dakota there was not an express reservation of power in Congress to amend the acts of the territorial legislature, nor was it necessary. Such a power is an incident of sovereignty, and continues until granted away. *Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government, it may make a void act of the legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the Territorial governments.* It may do for the Territories what the people, under the Constitution of the United States, may do for the States."
>
> National Bank *v.* County of Yankton, 101 U. S. 129 (133).

The case of Binns *v.* United States, 194 U. S. 486, arose in Alaska and was decided in 1904, prior to the passage by Congress of the Organic

Acts of May 7, 1906, and August 24, 1912, and in considering the power which Congress possessed in the government of that Territory the court said:

> "It must be remembered that Congress, in the government of the Territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution, that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the Territories. We are accustomed to that generally adopted for the Territories, of a quasi state government, with executive, legislative, and judicial officers, and a legislature, endowed with the power of local taxation, and local expenditures, but Congress is not limited to this form. In the District of Columbia it has adopted a different mode of government, and in Alaska still another. It may legislate directly in respect to the local affairs of a Territory or transfer the power of such legislation to a legislature elected by the citizens of the Territory. It has provided in the District of Columbia for a board of three commissioners, who are the controlling officers of the District. It may entrust to them a large volume of legislature power, or it may by direct legislation create the whole body of statutory laws applicable thereto. For Alaska, Congress has established a government of a different form. It has provided no legislative body but only executive and judicial officers. It has enacted a penal and civil code. Having created no legislative body and provided for no local legislation in respect to the matter of revenue, it has established a revenue system of its own, applicable alone to that Territory. Instead of raising revenue by direct taxation upon property, it has, as it might rightfully do, provided for that revenue by means of license taxes."

The case of Ferris *v.* Higley, 87 U. S. (20 Wall) 375 arose in the Territory of Utah over a conflict between an Act of the Territorial Legislature and the organic act. The Supreme Court said on this difference (p. 380),—(italics are mine):

> "There remains then only the further inquiry whether it is inconsistent with any part of the organic act itself. That act established a complete system of local government. *It stands as the constitution or fundamental law of the Territory.* It provides for the executive, legislative, and judicial departments of government. It prescribes their functions, their manner of appointment and election, their compensation and tenure of office. In regard to the judiciary, it creates the courts, distributes the judicial power among them, and provides all the general machinery of courts, such as clerk, marshal, prosecuting attorney, &c. It is here then, if anywhere, that we should look for anything inconsistent with the power conferred on the Probate Courts by the Territorial Legislature.

> * * * *The act of the Territorial legislature conferring general jurisdiction in chancery and at law on the Probate Court is, therefor, void.''*

Ferris *v.* Higley, 87 U. S. (20 Wall.) 375.

And in the case of Clayton *v.* Utah Territory, 132 U. S. 632, the Supreme Court affirmed the ruling in Ferris *v.* Higley, and also held (in syllabus):

> ''Under the organic act of that Territory the power to appoint an auditor of public accounts is vested exclusively in the governor and council; so much of the acts of the legislature of Utah of January 20, 1852, and February 22, 1878, as relates to the mode of appointing an auditor of public accounts, is in conflict with the organic act and is invalid.''

Clayton *v.* Utah Territory, 132 U. S. 632.

(3) UNITED STATES ELECTION LAWS IN A TERRITORY.

There is no constitutional requirement that even an organized Territory shall be represented in Congress by a Delegate from that Territory. The office is a Congressional creation and when provided is exclusively under the legislative control and power of Congress. The office may be abolished at any moment by a repeal by Congress of the organic act providing for it, and the Delegate sits in the House at the will of Congress. The House of Representatives has had frequent occasion to pronounce upon these fundamental propositions in respect to contested election cases from the Territories and the law is quite fully noted in Rowell's Contested Election Cases, pp. 664-667.

The jurisdiction of Congress over the election of a Delegate from a Territory ''is absolutely exclusive,'' as was pointed out in the Siebold case. Congress alone has power to provide the office and for the election or appointment of the Delegate. Congress has exclusive power to fix the qualifications of the Delegate, and to provide the method of his election, and therefore to pass election laws in a Territory.

By the Act of March 22, 1882, 22 Stat, L. 30, section 9, the election laws in force in the Territory of Utah were repealed and all officials removed and a new system enacted for the control of the election of a Delegate to Congress from that Territory. The matter came before the Supreme Court of the United States in the case of Murphy *v.* Ramsey, 114 U. S. 15 (44-45), and the court said (the italics are mine):

> ''The counsel for the appellants in argument seem to question the constitutional power of Congress to pass the Act of March 22,

1882, so far as it abridges the rights of the electors in the Territory under previous laws. But that question is, we think, no longer open to discussion. It has passed beyond the stage of controversy into final judgment. The people of the United States, as sovereign owners of the National Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the Government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself, for it may well be admitted in respect to this, as to every power of society over its members, that it is not absolute and unlimited. But in ordaining government for the Territories, and the people who inhabit them, all the discretion which belongs to legislative power is vested in Congress; and that extends, beyond all controversy, to determining by law, from time to time, the form of the local government in a particular Territory, and the qualifications of those who shall administer it. *It rests with Congress to say whether, in a given case, any of the people, resident in the Territory, shall participate in the election of its officers or the making of its laws; and it may, therefore, take from them any right of suffrage it may previously have conferred, or at any time modify or abridge it, as it may deem expedient.* The right of local self-government, as known to our system as a constitutional franchise, belongs, under the Constitution, to the States and to the people thereof, by whom that Constitution was ordained, and to whom by its terms all power not conferred by it upon the government of the United States was expressly reserved. The personal and civil rights of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, State and National; *their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States.* This doctrine was fully and forcibly declared by the Chief Justice, delivering the opinion of the court in National Bank *v.* County of Yankton, 101 U. S. 129. See also American Ins. Co. *v.* Canter, 1 Pet. 511; United States *v.* Gratiot, 14 Pet. 526; Cross *v.* Harrison, 16 How. 164; Dred Scott *v.* Sanford, 19 How. 393.''

Murphy *v.* Ramsey, 114 U. S. 15 (44-45).

It follows from the Utah case and the general rule that Congress has the same sovereign, paramount and exclusive control over the election of a Delegate in a Territory as over other matters of government therein.

(4) UNITED STATES ELECTION LAWS IN ALASKA.

There is, of course, no constitutional requirement that Alaska Territory shall be represented in Congress by a Delegate from that Territory.

"Alaska is one of the Territories of the United States." Steamer Coquitlam *v.* United States, 163 U. S. 346, decided May 18, 1896. "Nor can it be doubted that it is an organized Territory." Binns *v.* United States, 194 U. S. 486, decided May 31, 1904. The two foregoing cases were reaffirmed in the Rassmussen case from Alaska, and again that court announced that "Alaska is one of the Territories of the United States." Rassmussen *v.* United States, 197 U. S. 516, decided April 10, 1905.

But it was not until May 7, 1906, that Congress passed the Act entitled "An Act providing for the election of a Delegate to the House of Representatives from the Territory of Alaska," 34 Stat. L. 169. Thus after May 17, 1884, Alaska was one of the organized Territories of the United States, provided with executive and judicial departments, but it had neither a Delegate in Congress nor a Legislative Assembly. The Delegate was first provided for by the Act of May 7, 1906, and the Legislature by the Act of August 24, 1912. For twenty-two years the organized Territory of Alaska existed without any Delegate or other representative in Congress; and for twenty-eight years without a Legislative Assembly. Neither was provided until Congress judged it was in the interest of better government there that it should be done, and when done it was accomplished by an Act of Congress. It must be distinctly noted that the law for the election of a Delegate was passed by Congress six years before that for the creation of a Legislature.

SYNOPSIS OF ORGANIC ACT ENTITLED:

"An ACT PROVIDING FOR THE ELECTION OF A DELEGATE TO THE HOUSE OF REPRESENTATIVES FROM THE TERRITORY OF ALASKA," Approved May 7, 1906, 34 Stat. L. 169.

Sec. 1. of that Act provided (italics mine):

"That the people of the Territory of Alaska shall be represented by a Delegate in the House of Representatives of the United States, *chosen by the people thereof in the manner and at the time hereinafter prescribed, and who shall be known as the Delegate from Alaska.*"

The section then states the qualifications of the Delegate, and fixes his compensation and mileage.

Sec. 2 of the Act fixes the date of the election and provides for the election of the first Delegate for the short term.

Sec. 3 fixes the qualifications of electors.

Sec. 4 provides for elections in incorporated towns.

Sec. 5 provides for the election outside incorporated towns.

Sec. 6 provides election officers.

Sec. 7 provides for Delegate's watchers at the polls.

Sec. 8 provides for filling vacancies at elections.

Sec. 9 of the Act provides (italics mine):

> "Sec. 9. That the election boards herein provided for shall keep the several polling places open for the reception of votes from eight o'clock antemeridian until seven o'clock postmeridian on the day of election. *The voting at said election shall be by printed or written ballot.* The ballot at said first election shall be substantially in the following form:
>
> 'For Delegate from Alaska.'
>
> 'For the short term (here insert the name of the person voted for).'
>
> 'For the long term (here insert the name of the person voted for).'
>
> *At all elections after said first election the ballot shall be substantially in the following form:*
>
> *'For Delegate from Alaska.'*
>
> *'(Here insert the name of the person voted for).'*
>
> Such ballot shall be folded by the voter so as not to disclose the vote, and by him handed to any one of the judges of election, who shall immediately, in the presence of the voter and of all the members of the election board, deposit the same, folded as aforesaid, in the ballot box, where the same shall remain untouched until the polls are closed. At the time the ballot is so deposited the clerks of election shall each of them enter in his duplicate register the name of the voter and the fact that he has voted."

Sec. 10 provides for challenges and swearing in votes.

Sec. 11 provides for precinct canvass and return.

Sec. 12 of the Act is as follows (italics mine):

> "Sec. 12. That the governor, the surveyor-general and the collector of customs for Alaska shall constitute a canvassing board for the Territory of Alaska *to canvass and compile in writing the vote specified in the certificates of election returned to the governor from all the several election precincts as aforesaid.*
>
> * * * * * * *
>
> *In case it shall appear to said board that no election return as hereinbefore prescribed has been received by the governor from any precinct in which an election has been held, the said board may accept in place thereof the certified copy of the certificate of election for such precinct received from the clerk of the court, and may canvass and compile the same with the other election returns.*
>
> Said board, upon the completion of said canvass, shall declare the person who has received the greatest number of votes for Dele-

gate to be the duly elected Delegate from Alaska for the term for which he has been elected, and shall issue and deliver to him in writing under their hands and seals a certificate of his election.''

Sec. 13 provides for payment of election expenses.
Sec. 14 provides for payment of election expenses.
Sec. 15 penalties for violation of election laws.
Sec. 16. Act takes effect on passage.

No amendment was made to this law until the passage by Congress of the Act of 1912. ''An Act to create a Legislative Assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes,'' approved August 24, 1912, 37 Stat. L. 512. Two sections of this Act were provided so as specially to extend the election law of 1906 to the election of members of the Alaska legislature, and to change the date of holding the Delegate election from August to the same date in November as was provided for the election of members of the Legislature. These amendatory clauses are found in sections 5 and 17 of the Act of August 24, 1912, 37 Stat. L. 512, and read as follows (italics mine):

''Sec. 5. ELECTION OF MEMBERS OF THE LEGISLATURE. That the first election for members of the Legislature of Alaska shall be held on the Tuesday next after the first Monday in November, nineteen hundred and twelve, and all subsequent elections for the election of such members shall be held on the Tuesday next after the first Monday in November biennially thereafter; *that the qualifications of electors, the regulations governing the creation of voting precincts, the appointment and qualifications of election officers, the supervision of elections, the giving of notices thereof, the forms of ballots, the register of votes, the challenging of voters, and the returns and the canvass of the returns of the result of all such elections for members of the Legislature shall be the same as those prescribed in the Act of Congress entitled 'An Act providing for the election of a Delegate to the House of Representatives from the Territory of Alaska,' approved May seventh, nineteen hundred and six, and all the provisions of said Act which are applicable are extended to said elections for members of the legislature, and shall govern the same, and the canvassing board created by said Act shall canvass the returns of such elections and issue certificates of election to each member elected to the said legislature; and all the penal provisions contained in section fifteen of the said Act shall apply to elections for members of the legislature as fully as they now apply to elections for Delegate from Alaska to the House of Representatives.*''

* * * * * * * *

''Sec. 17. ELECTION OF DELEGATES.—That after the year nineteen hundred and twelve the election for Delegate from the

> Territory of Alaska, provided by "An Act providing for the election of a Delegate to the House of Representatives from the Territory of Alaska," approved May seventh, nineteen hundred and six, shall be held on the Tuesday next after the first Monday in November in the year nineteen hundred and fourteen, and every second year thereafter on the said Tuesday next after the first Monday in November, *and all of the provisions of the aforesaid Act shall continue to be in full force and effect and shall apply to the said election in every respect as is now provided for the election to be held in the month of August therein;* Provided, That the time for holding an election in said Territory for Delegate in Alaska to the House of Representatives to fill a vacancy, whether such vacancy is caused by failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by an act passed by the Legislature of the Territory of Alaska: *Provided further, That when such election is held it shall be governed in every respect by the laws passed by Congress governing such election."*

The foregoing Organic Acts, that of May 7, 1906, and sections 5 and 17 of the Act of August 24, 1912, are the United States Election Laws in Alaska for the election of Delegate to Congress and members of the Legislature and are the only Congressional enactments in force there on that subject.

It must be apparent to even the casual reader that Congress has reserved to itself the sole power to legislate on that subject. No power is given to the Legislature of Alaska to alter, amend, modify or repeal these provisions of the two Organic Acts, in relation to such elections, and the possibility of the claim of such power is expressly negatived by the plain and positive prohibitions in the Act creating the Legislature. Neither can the Legislature alter, amend, modify, or repeal the provisions of these laws in so far as they apply to the election of members of the Legislature. Any alteration, amendment, modification, or repeal of any of the provisions of these acts must be made by Congressional enactment, and not otherwise.

(5) TERRITORIAL AMENDMENTS TO ORGANIC ACTS.

Notwithstanding the positive prohibitions contained in sections 5 and 17 of the Organic Act creating the Legislature of Alaska it passed an act entitled "An Act to provide official ballots for elections in the Territory of Alaska." Sessions Laws of Alaska, 1915, pages 55-66.

The title of the Act is quite feeble to express the extent of the amendatory enactment for it seeks to remodel the Organic Act of May 7, 1906, in many respects not included in the title, notwithstanding the prohibitions contained in sections 5 and 17 of the Act of August 24,

1912, the Organic Act creating the Legislature. It does not repeal those Organic Acts entirely, for in section 20 of the Territorial Act the Legislature provided:

> "Sec. 20. That the Act of Congress entitled 'An Act providing for the election of a Delegate to the House of Representatives from the Territory of Alaska,' approved May seventh, nineteen hundred and six, or any acts amendatory thereof shall continue to apply to all elections except insofar as it is modified or amended by this Act."

In other words, the legislature attempted to amend and repeal the United States election laws for the election of the Delegate from Alaska —the Organic Act of May 7, 1096, and Sections 5 and 17 of the Act of Congress of August 24, 1912,—the Organic Act creating the Legislature itself, "insofar as it is modified or amended by this act." But they kindly permit those two Acts to exist insofar as they are not "modified or amended by this Act"! What's the Constitution between friends, anyway?

Synopsis of the Act of the Territorial Legislature entitled—"An act to provide official ballots for elections in the Territory of Alaska," Chap. 25, Sess. Laws of Alaska, 1915, page 55, (italics mine):

> "Sec. 1. That after the passage of this act, for all elections in the Territory of Alaska provided for in an Act of Congress entitled: 'An act to create a Legislative Assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes,' approved August twenty-fourth, nineteen hundred and twelve, the Clerk of the District Court of each judicial division of the Territory shall prepare ballots for use in their respective divisions."

Sec. 2 ballots to be printed on white paper.
Sec. 3 form of ballot for Delegate election, etc.
Sec. 4 ballot form carries instructions to voters.
Sec. 5 arrangement names candidates on ballots.
Sec. 6 names candidates to be separated by lines.
Sec. 7 names Delegate to Congress to head ballot.
Sec. 8 names of Territorial senators to follow.
Sec. 9 names of Territorial representatives.
Sec. 10 other blank forms to be printed on ballot.
Sec. 11 method of nominating Delegate to Congress.
Sec. 12 method of nominating candidates legislature.
Sec. 13 clerk of court to forward blank ballots to precinct election officers.

Sec. 14 Clerk of court to print and forward "Sample Ballots."
Sec. 15 U. S. Commissioner to deliver ballots in incorporated towns.
Sec. 16 polling place shall have election booth.
Sec. 17 ballots to be marked in booth by elector.
Sec. 18 marred ballots destroyed new issued.
Sec. 19 election judge may mark ballot for deficient elector.

Sec. 20. That the act of Congress entitled "An Act providing for the election of a Delegate to the House of Representatives from the Territory of Alaska," approved May seventh, nineteen hundred and six, or any acts amendatory thereof shall continue to apply to all elections except insofar as it is modified or amended by this act.

Sec. 21. That in any precinct where the election has been legally called and no official ballots have been received, *the voters are permitted to write or print their ballots,* but the judges of election shall in this event certify to the facts which prevented the use of the official ballots, which certificate must accompany and be made a part of the election returns.

Sec. 22 registration book, qualifications of electors printed thereon.
Sec. 23 elector may vote in any precinct in division, penalty.
Sec. 24 official violating election law, penalty.
Sec. 25 intimidation of voters defined, penalty.
Sec. 26 fraudulent voting, penalty.
Sec. 27 disqualified person voting, penalty.
Sec. 28 permitting illegal voting by officer, penalty.
Sec. 29 attempt officer influence voter, penalty.
Sec. 30 official tampering with ballots, penalty.
Sec. 31 intimidating or bribing voter, penalty.
Sec. 32 fraud of elector in casting ballots, penalty.
Sec. 33 inducing Indians to vote, penalty.
Sec. 34 nonfeasance or malfeasance of election officers, penalty.
Sec. 35 sale of liquor on election day, penalty.
Sec. 36 bribery or influencing voter, penalty.
Sec. 37 unlawful printing or distributing official ballots, penalty.
Sec. 38 unlawful possession or counterfeiting ballots, penalty.
Sec. 39 penalty where no other is provided.
Sec. 40 all acts or parts of acts in conflict with this act are hereby repealed insofar as they affect this act. Approved April 27, 1915.

It will be seen from the foregoing synopsis, that the act of the Territorial legislature amending the provisions of the Organic Acts of May 7, 1906, and sections 5 and 17 of the Act of August 24, 1912, is broad and contains many provisions not included within its title. The real

question is, however: what authority had the Legislature of Alaska to pass the act and to repeal parts of both of the Organic Acts of its very creation?

No such authority can be found in the organic act of August 24, 1912, 37 Stat. L. 512, but quite the contrary. Section 17 of that act changes the date of the election of Delegate from the month of August to the Tuesday next after the first Monday in November in 1912, and on that date every two years thereafter, and then specifically provides with respect to the United States Election Law for Alaska, approved May 7, 1906; "*and all of the provisions of the aforesaid Act shall continue to be in full force and effect and shall apply to the said election in every respect as is now provided for the election to be held in the month of August therein,*" the section then provides the legislature may prescribe the time for holding a special election to fill any vacancy in the office of Delegate, but it then provides: "*that when such election is held it shall be governed in every respect by the laws passed by Congress governing such election.*"

The Organic Act creating the legislature "stands as the Constitution or fundamental law of the Territory." Ferris *v.* Higley, 87 U. S. 375. The decisions of the courts of the United States are in accord that the Territorial legislature may not pass any law in conflict with the act creating it. The power of Congress in such case is paramount; the Territorial Legislature is the creature of Congress and has no power except that which Congress gives.

If it be assumed that the Legislature of Alaska has power to alter, amend, modify and repeal the organic Acts' of Congress mentioned, including the election laws therein, what is the limit of its power? If it may alter, amend or modify it may repeal, as it attempted to do in its act of 1915. And if it may repeal any part it follows logically it may repeal all and thereby destroy the Acts of Congress for the election of a Delegate from Alaska and members of the Alaskan Legislature. Of course, Congress had not given any such power to the Legislature of Alaska, but has by proper and apt phrase specially prohibited any attempt to exercise such power, by reserving to Congress itself full control over the United States election laws in the Acts of May 7, 1906, and August 24, 1912, for the election of the Delegate to Congress and the members of the Alaska Legislature.

2. THE SUIT OF SULZER *V.* THE CANVASSING BOARD.

(1) A suit to overcome Executive honesty.

(2) Collusion and judicial partisanship.

(3) Contestant not made a party.
(4) A disqualified judge.
(5) No mandamus against a Governor.
(6) Relators cause of action.
(7) An arbitrary decision.
(8) Mandamus against the Board.
(9) Another plain Remedy at Law.
(10) What Judge Jennings Decided, and Why.

(1) A SUIT TO OVERCOME EXECUTIVE HONESTY.

George B. Grigsby, a recent and violent convert from Republicanism, the Attorney General elect, and the acting general counsel for the Territory appointed by the Governor, was the legal adviser of the Canvassing Board in its canvass and compilation of the returns.

Robert W. Jennings, judge of the district court before whom the case of Sulzer *v.* The Canvassing Board was heard, was a candidate for Delegate to Congress at the general election in Alaska in August, 1912, and was overwhelmingly defeated, running a poor fourth. After that he was appointed judge of said court at Juneau.

John F. Pugh, collector of customs for Alaska, stationed at Juneau, is Judge Jennings brother-in-law, and ex-officio a member of the Territorial Canvassing Board.

Governor J. F. A. Strong, Surveyor General Charles E. Davidson, and Collector of Customs John F. Pugh, comprised the Canvassing Board having charge of the canvass and compilation of the election returns for the Delegate election of November 7, 1916.

When the canvassing Board met at Juneau in January, 1917, to canvass and compile said returns it was attended by Grigsby, as general counsel for the Territory, appointed by Governor Strong, who acted in said matter officially. At its meeting on January 20, 1917, at the Governor's office, the Board first considered the returns from Utica precinct, and found that the certificate required by the Territorial statute, explaining why the Congressional form of ballot had been used in the precinct instead of the Territorial form, was not included with the returns, and was then advised by Mr. Grigsby, "In that case you have the right to send for the certificate"—which Governor Strong did. At the same time the Deering return, from the same division, was examined and found to have the same alleged defect. Whereupon Mr. Grigsby advised the Board "It does not necessarily follow that you can not count the votes." But both precinct returns were passed for the time awaiting the amended returns which were then in the Clerk's

office in Nome, Alaska, and which the Governor had telegraphed for upon Grigsby's advice.

On January 31, 1917, the Canvassing Board opened the returns from Choggiung, and some irregularities appearing therein the following action was taken, and is thus stated in the official minutes of the Board on that day:

CHOGGIUNG.

"C. E. Davidson. I move that we lay over these ballots until tomorrow and ask Mr. Grigsby for his official opinion on the three precincts, namely, Naknek, Nushagak, Choggiung.

Motion unanimously carried."

On February 1, 1917, Mr. Grigsby, being in attendance upon the Board in his official capacity as general counsel for the Territory and Attorney-General elect, made the following statement to the Board, which is found in the official minutes of the Board of that date:

"Mr. Grigsby. On behalf of Mr. Hellenthal representing Mr. C. A. Sulzer, I protest the vote from Bristol Bay precincts, Choggiung, Nushagak, in the Third Division, on the ground that the ballots returned are not the official ballots prescribed by the Statute, and that no certificate of judges in either of said precincts accompanied the returns, explaining why the official ballots were not used.

"*Mr. Grigsby. As far as the form of the ballot is concerned I do not see any reason to throw them out.*

Mr. Pugh. Mr. Grigsby you mean to say that we are to canvass the three precincts, namely Nushagak, Choggiung, and Naknek.

Mr. Grigsby. Yes.

Governor. We will then proceed to count those ballots.

Mr. Grigsby. They are legal ballots when the voters make their own ballots. The law provides that if the voter is not provided with official ballots they can make their own ballots. If the official ballots are not provided there is no way of their knowing how or in what order to make the ballots."

* * * * * *

Governor. We will take up the Choggiung precinct, Naknek, Nushagak—This winds up the Third Division."

And the Territorial Canvassing Board did on February 1, 1917, officially canvass and compile the two precincts of Choggiung and Nushagak, on the advice of the general counsel for the Territory, George B. Grigsby, that the ballots cast were legal and ought to be counted!

Not only that but every one of the returns which Judge Jennings afterwards rejected were so counted, canvassed and compiled by the said Canvassing Board upon the advice of Grigsby. And the votes in

each and every one of the said rejected precincts were counted, canvessed and compiled for George B. Grigsby, as a candidate for Attorney General of Alaska, and were and are now included in the total vote so officially counted for him.

Notwithstanding his advice to the Board, and his credit with the same votes, on February 28, 1917, Grigsby wrote a letter of opinion and advice to the Board advising its members that the returns in Choggiung, Nushagak, Utica, Deering, Bonnifield and Vault were defective and ought to be rejected from the canvass of the vote for Delegate! Why? Because in the meantime it was discovered by a compilation of the returns that Wickersham had a majority of 31 votes, and it became necessary, if Sulzer was to be elected, that some precinct returns should be rejected!

And right there the row began. The Governor and Surveyor General had been advised by Grigsby that the returns mentioned were legal, and acting upon that advice had canvassed and compiled them; they were now asked to review their action and reject those votes, for dishonest, partisan and political reasons, and having their own ideas of honesty under their oaths of office refused to assist in stealing the election. *And right there the row began—and the appeal to Judge Jenning's court!*

(2) COLLUSION AND JUDICIAL PARTISANSHIP.

On March 1, 1917, the Canvassing Board had finished the canvass and compilation of the returns for the Territory, under the advice of Grigsby, and declared in their proceedings and minutes that this contestant had received a majority of 31 votes over Sulzer, and officially declared its purpose to issue to this contestant the certificate of election on the meeting of the Board on the next day.

On March 2d, Sulzer began a suit praying for the issuance of a restraining order against the Canvassing Board and its members to prevent it from taking any further action until the further order of the court, and praying for a Writ of Mandamus compelling the canvassing board to reject the returns from the challenged precincts which Grigsby had advised them to count. The Canvassing Board and its members, the Governor, the Surveyor General and Collector of Customs were made defendants. The petition was filed in the District Court before Judge Jennings, who promptly issued an alternative writ on the same day, without notice, commanding the Canvassing Board to reject the returns from the precincts mentioned and to issue a certificate of Election to Sulzer or to show cause on the next day, March 3d why they did not do so!

This contestant, James Wickersham, was not made a party to the suit and was not served with a copy of the alternative writ or any summons or notice, and had no notice or information about the bringing of the suit, and was at the time in Washington, D. C., in attendance upon the closing days of the 64th Congress, in which he was serving as Delegate from Alaska.

The Canvassing Board had no attorney. The general counsel for the Territory, Attorney General-elect Grigsby, acted in concert with the attorneys for relator, and publicly represented them, leaving his duty as the attorney for the Canvassing Board unperformed. The members of the Board had no interest in the contest; the case was not defended by attorney. It resolved itself into an exparte presentation; an uncontested suit before a partisan judge to try title to an office between two persons, one of whom was not notified, not present, and had no hearing.

John F. Pugh, collector of Customs, Judge Jennings' brother-in-law, who had formerly approved and joined in canvassing and compiling the challenged returns, appeared on March 6th and filed an answer in which he admitted all the allegations in the petition and "expresses his willingness, as a member of said Canvassing Board, to reject said ballots and issue said certificate, but, being only one of said Canvassing Board of three, he is powerless in the premises." On the same day, March 6th, the Governor and Surveyor General, also filed an answer, without the appearance of any attorney, setting up briefly the facts appearing before the Board, and alleging:

"5.

> "These defendants further respectfully state that they have made no further answer to the allegations contained in the petition filed herein, *for the reason that the Canvassing Board has no funds with which to employ legal counsel, and the members thereof do not conceive it to be their duty to employ such counsel and pay for his services from their private means.*"

In the lengthy opinion rendered on March 20th, by Judge Jennings he said:

> "All the defendants appeared without counsel, Mr. Davidson, beside filing his joint answer aforesaid, appeared in person. The plaintiff moved for judgment on the pleadings, but the court refused to consider the matter on such action, deeming it better to take it up on demurrer to the answers. Whereupon plaintiff demurred *ore tenus* to the answers. The court advised the Canvassing Board to secure counsel, whereupon Mr. Davidson made the following statement:
>
> 'Your Honor, we have no interest in it any more than we would

like the law point decided, and we have made our answer the best we could, and we have no other interest any more than to obey the orders of the court whatever they may be.' ''

Without hearing any testimony, but upon the ex parte pleadings, Judge Jennings delivered a long opinion on demurrer *ore tenus,* on March 20th, and in which he held the precincts challenged must be rejected. Thereupon and on March 22d, he issued a peremptory writ of mandamus directed to the Canvassing Board commanding it to reject the returns from Choggiung, Nushagak, Utica, Deering, Bonnifield and Vault, and to issue a certificate of election to the relator Sulzer.

To prevent the Canvassing Board from applying the alleged rule of law in relation to defective returns to other precincts where similar defects existed the judge found as a fact and ordered in said peremptory writ of mandamus:

''Whereas the court doth further find that with the exception of making the deduction aforesaid and of issuing said certificate said Board has completed the canvas.'' * * * * *

''Therefore, this is to command you, and each of you, that upon receipt of this writ of mandamus you do worthwith convene as a Canvassing Board for the Territory of Alaska, and that you reject the votes from the said precincts of Choggiung, Deering, Nushagak, Utica, Bonnifield and Vault, and that you issue a certificate of election to Charles A. Sulzer as having received the greatest number of votes for Delegate to Congress from Alaska, and that said certificate be in the *usual form* as by law provided.''

This suit was not a real contest; the relator controlled the action for the plaintiff and defendant Pugh, the judge's brother-in-law; there was no appearance by attorney for the majority of the Canvassing Board, who both in person and by their answer disclaimed any interest and refused to employ counsel; the general counsel for the Territory, George B. Grigsby, attorney general elect, refused to appear and defend the Canvassing Board or the interest of the public or this contestant; Grigsby had first advised them to count the returns and then gave an opinion advising the Board to reject them; he appeared before the Canvassing Board for the attorneys for relator Sulzer and protested against canvassing and challenged precincts which he then instructed them to canvass and compile as legal returns. The judge, whose duty it was to do justice and protect the rights of the public and this contestant declined to perform that duty, and the case went by default. It was an agreed case—a collusive proceeding, begun in secret and conducted without notice to the contestant, deliberately and unfairly, to deprive him and the people of Alaska of the benefit of a fair count at

the conclusion of a fair election. It was a cowardly and corrupt proceeding, under the guise of a suit in a court of justice to capture an election which the voters had not given relator. Finally under the coercive power of the writ and on March 24th, the Canvassing Board was compelled to issue the certificate of election and deliver it to Sulzer, relator.

(3) CONTESTANT NOT MADE A PARTY.

The Canvassing Board on a full and final canvass and compilation of all the returns from all the precincts in Alaska officially declared that James Wickersham, this contestant, had received 6490 votes and was elected; that Charles A. Sulzer, contestee, had received only 6459 votes, and was not elected. Now in Sulzer's suit to try his title and right to the certificate of election—to the commission of the people of Alaska to appear in Congress and take the oath of office and to represent them as Delegate, was this contestant entitled, of right to notice and a hearing?

No honest man, be he layman or lawyer, can have any doubt on that point, and even Judge Jennings's conscience as a lawyer troubled him till he apologized for his wrongful act in hearing the case without performing his duty in that regard. In his opinion he said (italics mine):

> "The court advised the cavassing board to secure counsel, whereupon Mr. Davidson made the following statement:
>
> 'Your Honor, we have no interest in it any more than we would like the law point decided, and we have made our answer the best we could, and we have no other interest any more than to obey the orders of the court whatever they may be.'
>
> "*The court thereupon inquired if Judge Wickersham was represented at this hearing, and being answered in the negative stated that it would hear the oral argument of plaintiff in favor of the demurrer and would be glad to consider any argument that any friend of Judge Wickersham might wish to make or any brief he might choose to file at that time or a later date.*
>
> "*It is to be regretted that Judge Wickersham has not intervened herein. He is a proper party, but probably not a necessary party. At present, as the Court is informed he is absent from the Territory and the date of his return hereto is problematical.*"

So the judge knew this contestant was not a party to the suit, heard the members of the Canvassing Board disclaim any interest in the case, declared contestant was a *proper* party, knew that he was being deprived of his right to the certificate of election without notice, and apologized publicly for the wrong, but wilfully and without right consumated the offense.

Chapter 3, Title 2 of the Act of June 6, 1900, 31 Stat. L. 336,

contains the general provisions relating to parties to actions in Alaska. Compiled Laws of Alaska, 1913, p. 385. Sections 857 and 870 and 872 of the Compiled Laws of Alaska provide that (italics mine):

> "Sec. 857. Every action shall be prosecuted in the name of the real party in interest," etc. * * *
>
> "Sec. 870. All persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs, except as in this chapter otherwise provided. *Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to the complete determination or settlement of the questions involved therein.*"

Section 872 of the Compiled Laws of Alaska, provides (italics mine):

> "Sec. 872. The court may determine any controversy between parties before it when it can be done without prejudice to the rights of others, or by saving their rights; *but when a complete determination of the controversy cannot be had without the presence of other parties, the court shall cause them to be brought in.*"

When, therefore, it became apparent to Judge Jennings that this contestant was a "proper party," and he discovered that his interests were to be jeopardized by the suit it was his duty to stop the proceedings until the necessary parties were brought in—"*the court shall cause them to be brought in.*" This is not only the law but common honesty.

In Mallow *v.* Hinde, 12 Wheat. 193, (198), the court held that if the right of a party not before the court is inseparably connected with the claim of the parties litigant so that a final decision cannot be made without affecting the rights of the absent party, he must be brought in. And the court said:

> "We do not put this case upon the ground of jurisdiction, but upon the much broader ground, which must equally apply to all courts of equity whatever may be their structure as to jurisdiction. We put it on the ground that no court can adjudicate directly upon a person's right, without the party being actually or constructively before the court."
>
> Mallow *v.* Hinde, 12 Wheat. 193-198.
>
> "This court will not make a final decree upon the merits of the case, unless all persons who are essentially interested, are made parties to the suit, although some of those persons are not within the jurisdiction of the court."
>
> Russell *v.* Clark's Executors, 11 U. S. (7 Cranch), 69 (97).

In Shields *v.* Barrow, 58 U. S. (17 How.) 130, 139, the Supreme Court of the United States said on the subject of parties to a suit:

"The court here points out three classes of parties to a bill in equity. They are: 1. Formal parties; 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties; 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

And the court concluded:

"As to parties having an interest which is inseparable from the interests of those before the court, and who are, therefore, indispensable parties see Cameron *v.* McRoberts, 2 Wheat. 571; Mallow *v.* Hinde, 12, Wheat, 197."

In California *v.* So. Pac. Co., 157 U. S., on pages 250-251, the court said:

"And Mr. Justice Curtis added: 'It remains true, notwithstanding the Act of Congress and the 47th rule, that a Circuit Court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without affecting those rights. To use the language of this court in Elmendorf *v.* Taylor, 10 Wheat. 167: 'If the case may be completely decided, as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the court cannot reach, as if such party be a resident of another State, ought not to prevent a decree upon its merits.' But, if the case cannot be thus completely decided the court should make no decree."

And the court in California *v.* So. Pac. Co. *supra.* concluded:

"Sitting as a court of equity we cannot, in the light of these well-settled principles, escape the consideration of the question whether other persons who have an immediate interest in resisting the demand of complainant are not indispensable parties, or, at least, so far necessary that the cause should not go on in their absence. Can the court proceed to a decree as between the State and the Southern Pacific Company, and do complete and final justice, without affecting other persons not before the court, or leaving the

> controversy in such a condition that its final termination might be wholly inconsistent with equity and good conscience,'' * * *
>
> We are of opinion that our original jurisdiction cannot be thus extended, and that the bill must be dismissed for want of parties who should be joined, but cannot be without ousting the jurisdiction.''

While a suit in mandamus is not strictly a suit in equity it is an extraordinary remedy, heard by the judge without a jury, and equitable rules apply. Not only that but Section 872 made it the duty of the judge ''to cause them to be brought in'' if a party defect existed even in a law case.

Now in the suit of Sulzer *v.* The Canvassing Board was this contestant an indispensable or necessary party? If so it was the duty of the judge to refuse to move therein until contestant was brought in as a party. Of course, the excuse offered for the failure to make him a party will be that the mandamus proceeding was one to compel the Canvassing Board to act—to move. But the answer to that suggestion is that *neither the petition nor the writ stopped at that point.* The petition showed on its face that the Canvassing Board was acting, but not in the way the petitioner desired. It had canvassed and compiled the returns and was proceeding to issue the certificate to this contestant; petitioner demanded and received a restraining order to stop that action. The board intended to count the returns; petitioner demanded that they be rejected, and Judge Jennings rejected them. The Board had declared contestant to be elected to the office of Delegate to Congress, but Judge Jennings declared the relator elected. On its face, the petition and pleadings disclosed an attempt on the part of the relator to capture from contestant the object of the suit, the subject of the action, the possession of the certificate of election. The Canvassing Board declared it was contestant's property, the relator claimed it, and the court decided that Sulzer, and not contestant, was entitled to its possession.

Certainly contestant had the same right to be heard in a suit for the possession of the certificate of election that Sulzer had. The court must have concluded that relator had a right or interest in the suit, the right to have the possession of the certificate. The court knew contestant claimed it, the pleadings showed that fact clearly, the petition stated it, and alleged that the Canvassing Board had declared contestant elected and would deliver the certificate to the contestant; that was the principal support of the Sulzer suit. The court knew if relator obtained the certificate the contestant must lose it; the pleadings thus disclosed the basis of a real controversy between real parties in interest,

—one of whom was not made a party to the suit! It was the judge's duty to stop the proceedings under section 872 until the real party in interest, the party who really represented the other side of the controversy, could be brought into court, but he did not do it!

The members of the Canvassing Board had each disclaimed any interest in the suit, and pointed out the real party in interest. This contestant was the real party defendant in interest, and was such a party as the Supreme Court of the United States in Shields *v.* Barlow, supra said: "not only had an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

(4) A DISQUALIFIED JUDGE.

There are two other defects in parties defendant which Judge Jennings refused to consider. John F. Pugh, Collector of Customs, and ex-officio a member of the Canvassing Board, was one of the defendants, and also the brother-in-law of Judge Jennings, and a member of his family. This fact was known to Judge Jennings, who also knew that he was disqualified to hear the case for that reason. Pugh, brother-in-law, sat with the Board and joined in canvassing and compiling the votes and returns from the challenged precincts under the advice of the Territorial Counsel, George B. Grigsby, Attorney General elect.

> "Mr. Pugh: Mr. Grigsby you mean to say that we are to canvass the three precincts, namely, Nushagak, Choggiung, and Naknek?
> Mr. Grigsby: Yes.
> Governor: We will proceed then to count those ballots."

And Mr. Pugh approved the canvass and compilation of every ballot and return which was afterwards rejected on his motion, for he thought until the compilation was finally cast up that his partisan, Sulzer, was elected, and had a majority of all the votes over this contestant.

When the fact was finally ascertained that this contestant had the majority, and the Sulzer petition was filed, Mr. Pugh rushed in with a separate answer admitting all the allegations of Sulzer's petition and declaring under oath "that he believes the votes of the precincts mentioned in said petition should not be counted by the Canvassing Board for the reasons set forth in said petition and that a certificate of election should be issued to said Charles A. Sulzer for said reasons, and he expresses his willingness as a member of said Canvassing Board, to reject said ballots and issue said certificate; but, being only one of said Canvassing Board of three, he is powerless in the premises."

And in the affidavit to that answer Pugh took a solemn oath that "I have read the foregoing answer, know the contents thereof, and the same is true." Yet this same brother-in-law Pugh, as a member of the Canvassing Board urged and approved the counting of the same ballots and returns in Utica and Deering precincts in the matter of the contest between Corrigan and Reed, and seated Corrigan on those ballots, when if he had rejected them Corrigan would have been defeated and Reed elected; and urged and approved the counting of the same ballots and returns in the Croggiung and Nushagak precincts in the matter of the contest between Murray and Holland, and seated Murray on those ballots, when if he had rejected them Murray would have been defeated and Holland elected! In other words, Mr. Pugh swore the returns were illegal for Wickersham, but legal for Corrigan and Murray. His oath of illegality was based on the same identical documents; probably he is not guilty of perjury, but he certainly is of partisanship and rank injustice. Judge Jennings, Pugh's brother-in-law, knew these facts, for they were called to his attention and mentioned by him in his opinion.

Sections 707 and 708 of the Act of Congress entitled "An Act making further provision for a civil government for Alaska, and for other purposes," 31 Stat. L. 321 (444) provide (italics mine):

> "Sec. 707. A judicial officer is a person authorized to act as a judge in a court of justice. Such officer shall not act as such in a court of which he is a member in any of the following cases:
>
> First. In an action or proceeding to which he is a party, or in which he is directly interested;
>
> Second. When he was not present and sitting as a member of the court at the hearing of a matter submitted for its decision;
>
> *Third. When he is related to either party by consanguinity or affinity within the third degree;*
>
> Fourth. When he has been an attorney in the action or proceeding in question for either party.
>
> But this section does not apply to an application to change the place of trial or the regulation of the order of business in court. In the cases specified in subdivisions three and four the disqualification may be waived by the parties, and shall be deemed to be waived unless an application be made as provided in this code."
>
> "Sec. 708. Whenever it appears that the judge of the district court presiding in the division where the action is pending, is disqualified under the provisions of the section last preceding the action shall be transferred to another division of said court unless a judge of another division will appear and preside during the disposition thereof; Provided, however, That the parties may by written stipulation agree upon a member of the bar of said court to try the same."

It does not need argument or the citation of other authorities to show that Judge Jennings violated both the law and the ethics of the legal profession in hearing the case of Sulzer *v.* The Canvassing Board, * * * and John F. Pugh, defendants, in the face of these two sections of the laws of Congress. But when, in connection therewith, he knew of the activity and bias, the venality and partisanship of his brother-in-law Pugh, his action in hearing the case cannot be condoned.

Judge Jennings knew the law, and he knew that Pugh was his brother-in-law. He knew that Pugh had approved the canvass and compilation of the challenged precincts and knew that he subsequently made the sworn answer declaring the illegality of what he had previously declared legal under his oath of office. He knew that Pugh was a partisan of Sulzer, and he knew that neither Sulzer nor Pugh, nor Sulzer's attorneys, would challenge the judge's disqualification, but would rely upon the relationship and the evident bias of both to gain an unconscionable advantage against Contestant who was not present, nor a party to the suit. Jennings knew that he was disqualified by section 708 and knew that it was his duty under his oath of office to suggest his own disqualification and call in either another judge or a stipulated member of the bar to try the case. His action in trying the case under the circumstances is in keeping with his arbitrary and partisan conduct all through the case. Is there a member of this Committee who believes that an honest man or an unbiased judge would so violate the plain provisions of the statutes of the United States?

(5) NO MANDAMUS AGAINST A GOVERNOR.

A proper and timely suggestion was made to Judge Jennings that he had no jurisdiction or authority to issue a coercive writ of mandate against the Governor of Alaska. It was pointed out to him that Congress in the performance of its constitutional duty and power to govern the Territory had imposed supreme executive authority upon the governor, and had not authorized any court to control or limit that authority. No court can control or limit the President of the United States in the performance of his constitutional duties; no State court can control or limit the Governor of a State in the performance of his constitutional duties, so no territorial court can control or limit the Governor of the Territory of Alaska in the performance of the duties imposed upon him by the Organic Acts of Congress. No doubt Congress might thus limit the power of the Governor in that respect, but it has not done so. On the contrary it has specially imposed supreme

executive authority upon him, generally, and also as a member of the Territorial Canvassing Board.

Section 2 of the Act of Congress entitled "An Act providing a civil government for Alaska," approved May 17, 1884, 23 Stat. L. 24, provides:

> "Sec. 2. That there shall be appointed for the said district a governor, who shall reside therein during his term of office and be charged with the interests of the United States Government that may arise within said district.
>
> "To the end aforesaid he shall have authority to see that the laws enacted for said district are enforced, and to require the faithful discharge of their duties by the officials appointed to administer the same. * * *
>
> And he shall perform generally in and over said district such acts as pertain to the office of governor of a Territory, so far as the same may be made or become applicable thereto."

Here, then, is the supreme executive authority of the Territory; no statutory authority is given to any court in Alaska to control or limit him in the performance of that Constitutional or organic power, and unless Congress does impose such power on some court it does not possess it.

The Canvassing Board created by Congress to canvass and compile election returns for Delegate to Congress from Alaska was created and its duties imposed by section 12 of the Act of Congress of May 7, 1906, providing for the election of Delegate.

> "Sec. 12. That the governor, the surveyor general, and the collector of customs for Alaska shall constitute a canvassing board for the Territory of Alaska *to canvass and compile in writing the vote specified in the certificates of election returned to the governor from all the several election precincts as aforesaid.*"

No statutory authority is given to any court created by Congress in Alaska, or elsewhere, to control or limit the action of these officials, and the rule of law then is that their action cannot be so controlled or limited.

High, in Extraordinary Legal Remedies (3d Ed. Sec. 120), after citing the authorities, concludes,

> "The chief executive of the State is, as to the performance of any and all official duties, entirely removed from the control of the courts, and that he is beyond the reach of mandamus, not only as to duties of a strictly executive or political nature, but even as to purely ministerial acts whose performance the legislature may have required at his hands."

Judge Cooley, in delivering the opinion of the Supreme Court of Michigan, in Sutherland *v.* Governor, 29 Mich. 320, 18 Am. Rep. 89, calls attention to the practical difficulties of distinguishing between political and ministerial duties, and says:

> "But when duties are imposed upon the Governor, whatever be their grade, importance or nature, we doubt the right of the courts to say that this or that duty might properly have been imposed upon a Secretary of State, or sheriff of a county or other inferior officer, and that inasmuch as in case it had been so imposed, there would have been a judicial remedy for neglect to perform it, therefore there must be the like remedy when the Governor himself is guilty of a similar neglect. The apportionment of power, authority, and duty to the Governor is either made by the people in the Constitution, or by the Legislature in making laws under it; and the courts, when apportionment has been made, would be presumptious if they should assume to declare that a particular duty assigned to the Governor is not essentially executive, but is of such inferior grade and importance as properly to pertain to some inferior office, and consequently for the purposes of their jurisdiction, the courts may, treat it precisely as if an inferior officer had been required to perform it. To do this would be not only to question the wisdom of the Constitution or the law, but also to assert a right to make the Governor the passive instrument of the judiciary in executing its mandates within the sphere of his own duties. Were the courts to go so far, they would break away from those checks and balances of government which were meant to be checks of co-operation, and not of antagonism or mastery, and would concentrate in their own hands something at least of the power which the people either directly or by the action of their representatives decided to entrust to the other departments of the government."

The case of Huidekoper *v.* Hadley, 177 Fed. 1, was brought by the plaintiff against Governor Hadley, and others, comprising the Board of Equalization of the State of Missouri, to compel them, by mandamus, to perform a ministerial duty. The United States Circuit Court of Appeals, Eighth Circuit, after citing Highe and Cooley, as above quoted, proceeded:

> "In State ex rel. *v.* Stone, 120 Mo. 428, 25 S. W. 376, 23 L. R. A. 194, 41 Am. St. Rep. 705, the Supreme Court of Missouri cited and considered the numerous authorities relating to this subject and stated the following conclusion:
>
> "Abundant authority establishes the position here taken that mandamus will not issue to the Governor to compel the performance of any duty pertaining to his office, whether political or merely ministerial; whether commanded by the Constitution or by some law passed on the subject.

"This doctrine was afterwards affirmed in the later case of State ex rel *v.* Meier, 143 Mo. 439, 45 S. W., 306. Whether, therefore, the duty imposed upon the Governor of Missouri to act as a member of the State Board of Equalization is ministerial, executive, or political in its character, he is not, according to the law of this State as interpreted by its highest judicial tribunal, responsible to the judiciary for his action. The high sense of duty which must be presumed to actuate the chief executive of a state is the sole arbiter to which appeal can be made in such matters."

Hnidekoper *v.* Hadley, 177 Fed. 1 (12).

And the same rule prevails in Colorado.

"The State Board of Canvassers, composed of the five highest state executive officers, in the exercise of its power in canvassing election returns for the election of representatives in the General Assembly, prescribed by 1. Mills Ann. Stat. Sec. 1631, discharges duties purely political and governmental in character, and hence its action cannot be controlled by mandamus."

Orman *v.* People (Colo.) 71 Pac. 430.

And in Maine, Dennett, Petitioner, 32 Maine 508, 54 Am. Dec. 602. The cases of State *v.* Huston, (Okla.) 113 Pac. 190; State *v.* Stone (Mo.) 25 S. W. 376; State ex rel Latture *v.* Frazier (Tenn.) 86 S. W. 319, and Rice *v.* Austin, 19 Minn. 103, 18 Am. Dec. 330, are all to the same point, and contain full citations of authorities showing it to be the general rule that the Governor cannot be in any wise controlled or limited in his executive duties by mandamus.

While not fully admitting the force of the rule Judge Jennings evaded it by declaring that whether he had authority to coerce the Governor by mandamus he might safely issue his writ against the other two members of the Board and control their action. There is a good answer to that twist, and it is that Pugh, one of the other members is Jennings brother-in-law and as to him Jennings is disqualified by section 708 of the Organic Act of June 6, 1900, heretofore adverted to.

It follows, that the court had no jurisdiction by mandamus to coerce the Governor, and was disqualified by section 708 to hear the case against Pugh, his brother-in-law. And in the case of Dispatch *v.* Davidson, 4 Alaska, 727, he had previously refused to grant a mandamus against the third member of that board, upon a much stronger statement of facts.

(6) RELATOR'S CAUSE OF ACTION.

The suit was entitled "The Territory of Alaska on the relation of Charles A. Sulzer, and Charles A. Sulzer, relator and plaintiff, *vs.* The Canvassing Board of the Territory of Alaska, consisting of J. F. A.

Strong, Charles E. Davidson, and John F. Pugh, defendants,'' and was filed March 2, 1917, in the District Court for the District of Alaska, Division No. 1 Juneau, and it was numbered 1592-A therein.

Relator alleges his candidacy for the office of Delegate in the November 1916 election, and that Lena Morrow Lewis and James Wickersham were also candidates; that Strong, Governor, Davidson, Surveyor General, and Pugh, Collector of Customs constitute the Canvassing Board; alleges that he received the greatest number of legal votes at the election, but that the Canvassing Board refused to issue the certificate to relation, but threatened and announced their intention to court and canvass certain votes from Choggiung, Deering, Nizina, Nushagak, Utica, Bonnifield, and Vault precincts, which he alleged to be false and spurious (italics mine):—

> ''In that the voters casting said ballots failed to use the form of official ballot prescribed by the laws of Alaska, and failed to use the official ballots prepared for said election according to the laws of Alaska, but on the contrary, in casting said votes, used a form of ballot either prepared by the voters themselves, or by some person other than the person or persons authorized by law to prepare and provide said ballots.''

''XI.

> ''That the laws of Alaska provide as follows: 'That in any precinct where the election has been legally called, and no official ballots have been received, *the voters are permitted to write or print their ballots*, but the judges of election, shall, in this event, certify to the facts which prevented the use of the official ballots, which certificate must accompany and be made a part of the election returns.' ''

The foregoing paragraphs from his petition contain the gravamen of the charge upon which petitioner demands judgment—that the electors in six precincts voted the Congressional form of ballot for Delegate from Alaska instead of the form prescribed by the Territorial Legislature. There was no charge of fraud or wrongdoing on the part of the electors or the election officers: it is admitted that the voters cast the ballots in good faith, that they were properly qualified, and that the territorial law itself provided for that form of ballot if the Territorial form failed to reach the polling place. But, the charge is, that no certificate of the election judges in six of said precincts accompanied the returns certifying to the facts which prevented the use of the Territorial form of ballots.

That's all! It is admitted, because not denied anywhere in the pleadings, that in each of said precincts the election was legally called, that

the electors were entitled to and did vote according to both the Congressional and Territorial law, that they voted legal ballots under both the law of Congress and the Territorial Legislature, but the election judges did not make and enclose with the returns a certificate stating the facts which prevented the voters from casting the first form of ballot prescribed by the Territorial Legislature, instead of the second form prescribed by both the Territorial Legislature and the laws of Congress.

A second charge is made that in the Vault precinct "said returns are not certified to as provided by law, and in that, no certificate of the result of the election in said precinct, specifying the number of votes cast for each candidate accompanied or was included in said returns, as required by Section 402 of the Compiled Laws of Alaska." No charge of fraud or wrongdoing, except that the election officer failed to include a form of statement of result with the returns. It is admitted that the election was legal, the voters cast legal ballots, no one attempted to defraud the relator, just an alleged failure in an immaterial matter to follow the strict rule in making the returns!

The petition then contains the allegation that if the returns from said challenged precincts are counted the vote for James Wickersham will be 6490 and the total vote for relator Sulzer will be only 6459; that the Canvassing Board threatens to count the said votes from the challenged precincts, and threatens

> "and intend, and will, unless restrained by this Honorable Court issue a certificate of election to the said James Wickersham, based upon said false compilation of votes, notwithstanding that your relator and plaintiff herein received the highest number of votes cast at said election, and is entitled to said certificate of election."

Here, then, is a solemn admission of the truth by the relator that if the official returns are counted this contestant will have 6490 votes and be elected and the relator only 6459 votes and be defeated.

The next and final allegation in relator Sulzer's petition clearly demonstrates the character of the controversy, shows that it was intended to deprive this contestant of his right to the certificate of election and to do it without notice to him or any opportunity to defend his interest; the allegation is

> "That plaintiff and relator has no plain, speedy, or adequate remedy in the ordinary course of the law, and will be deprived of a certificate of election entitling him to the office of Delegate to Congress for the Territory of Alaska, unless this court issues this return of mandate, compelling the said canvassing board to reject and not count the returns from each and all of the foregoing pre-

cincts hereinbefore enumerated, and compelling said canvassing board to issue to the relator and plaintiff herein, its certificate certifying that he was duly and regularly elected to said office of Delegate to Congress."

In short, it is alleged that the Canvassing Board had already found and declared from the canvass and compilation of all the returns in the territory that Wickersham, the contestant, had 6490 votes and the relator, Sulzer, 6459 votes and the Canvassing Board upon this official canvass will issue the certificate of election to Wickersham unless the court shall compel the Canvassing Board to reject the six challenged precincts and compel the Board to issue the certificate of election to Sulzer; and this the court is asked to do by its peremptory mandamus without permitting Wickersham to be made a party to the suit or give him any opportunity to present his claim or defend his right which was superior to that of Sulzer, because he had thirty-one more votes in the final canvass and compilation than Sulzer had.

(7) AN ARBITRARY DECISION.

The petition in this case confined the issue to the precincts of Choggiung, Nushagak, Deering, Utica, Bonnifield, Vault, and Nizina. The last mentioned precinct was finally dropped out because no possible evidence could be found in the record or the pleadings upon which to reject it. The final decree went only to the six precincts remaining. It appears from the record that Mr. John Rustgard, an attorney residing at Juneau, was invited by Judge Jennings to file a brief in the case in the absence of any attorney for the defendant, the Canvassing Board. In his recapitulation, at the end of his opinion the judge said:

"It is suggested by Mr. Rustgard that if the court had before it the returns from all the precincts in Alaska it might appear that there were defects in the returns from other precincts, sufficient in gravity and number to turn the results obtained if the ballots (?) in the precincts discussed herein were rejected.'

"This, of course, is possible, but the pleadings disclose nothing of that nature. On the contrary, the answers allege that counting the precincts heretofore adverted to Wickersham has 6490 votes, and Sulzer has 6459; that the Canvassing Board has finished the canvass of all votes and was about to issue a certificate of election to Wickersham when the alternative writ was served upon them.

"It is obvious that if the votes be rejected which the Court has decided should be rejected Wickersham's 6490 will suffer a diminution of 69, leaving him only 6421, and Sulzer's 6459 will suffer a diminution of 19, leaving him 6440—in which event the certificate of election should go not to Wickersham but to Sulzer.

"The demurrer will be sustained."

And this judge in a court of justice thereupon refused to consider any other returns in the Territory of Alaska, although the same defects actually existed in some of them as existed in the six precincts rejected, because he well knew if the same rule of law was applied to them which he applied to the six precincts the results would be to throw out precincts in which Sulzer had a majority and thereby reduce Sulzer's vote, and leave Wickersham the certificate of election.

After the judge had renderd his opinion and refused to extend the uniform rule to all the precincts in Alaska, Mr. Emery Valentine, a public spirited citizen, on March 21st filed a protest with the canvassing board against canvassing and compiling the returns from other precincts where similar defects to those in the six precincts considered also existed. The Board filed that protest in Judge Jenning's court and asked his opinion as to their duty. In a remarkable letter, addressed to the Board, dated March 22d, the judge referred to this matter of additional precincts and defects therein at some length, but advised the Board that it had declared in its answer

> "That the Territorial Canvassing Board did, on the first day of March, 1917, *complete* its canvass and compilation of the returns," etc. * * * "Now you state in your communication to me that some private citizen has lately entered a protest of some kind and that there are some *irregularities* which have not entered into the case that has been heard before me, and on which I issued the alternative writ, and you ask my advice as to what you should do."

The court did nothing but close the ear of justice and honesty to the suggestion until he signed the peremptory writ and in that writ he effectually prohibited the Canvassing Board from applying the same rule of law announced by him as applicable to the six precincts to other precincts where the same defects existed, by this clause in his Writ of Mandamus:

> *"Whereas, the court doth further find that with the exception of making the deduction aforesaid and of issuing said certificate said Board has completed the canvass."*

He thereby prohibited the Canvassing Board from amending their canvass and compilation of the returns by applying his own ruling on the law relating to the six rejected precincts to other precincts where the same defects existed. And Judge Jennings made that unauthorized order because he well knew that if his announced rule of law was so applied to other precincts, just declared and enforced in the six precincts rejected, it would result in rejecting returns from precincts where Sulzer had large majorities, and thus defeat him and seat Wickersham.

His action in making that order was not only not within the pleadings or the demand for the relief prayed for, but it is an exhibition of partisan politics never before known in American courts.

Before Judge Jennings signed his decree he was also advised that the Canvassing Board might relieve itself of responsibility for the overturning of an honest American election by stating in the certificate issued to Sulzer the fact that it was so issued pursuant to the peremptory Writ of Mandamus issued by the court. To obviate that honest statement of fact he added to his mandate this clause (italics official):

> * * * "and that you issue a certificate of election to Charles A. Sulzer as having received the greatest number of votes for Delegate to Congress from Alaska, and that said certificate be in the *usual form,* as by law provided."

In the minutes of the meeting of the Canvassing Board held on March 24th, in pursuance to the mandate the above clause was read, and the Governor said:

> "Governor. The law provides no form of certificate and never has. The certificate we have used has been simply one drawn up by this office.
>
> "Governor. The purpose of the meeting has been stated, what do you want to do about it?
>
> "Mr. Pugh. I move that we start to take off the tally sheets the vote for Delegate as indicated in the writ, namely: Choggiung, Deering, Nushagak, Utica, Bonnifield, Vault.
>
> "Mr. Davidson. Motion seconded.
>
> "Governor. It has been regularly moved and seconded that the tally sheets should be corrected to comply with the command of the court, that is: the votes so far as Delegate be eliminated:
>
> "69 votes should be deducted from Jas. Wickersham.
>
> "19 votes should be deducted from Chas. A. Sulzer.
>
> "Mr. Pugh. I move that we issue certificate in the same form as we did two years ago.
>
> "Mr. Davidson. Motion seconded.
>
> "Governor. It has been regularly moved and seconded that this Board do therefore issue a certificate of election to Charles A. Sulzer in accordance with the above peremptory Writ of Mandamus, and that also in accordance with the aforesaid Writ of Mandamus, the certificate be issued in the usual form."
>
> "Governor. It had better be stated that while the Writ declares that the certificate be in the *usual form* as by law provided, the law provides for no form. The form heretofore used has been one that was provided by the Canvassing Board.
>
> "Governor. All in favor of the motion say aye.
>
> "Motion unanimously carried."

Judge Jennings well knew, of course, that if the Canvassing Board

stated the facts on the face of the certificate of election that it was issued in pursuance of the mandate of the court, and not by the Canvassing Board in the exercise of its jurisdiction under the United States statute, it might result in the House of representatives sending the matter to the election committee at once, even before Sulzer could be sworn in, and to prevent that Judge Jennings made the order that the certificate be in the "*usual form*," and do not recite the facts. A decree or a document which dare not recite the truth ought not to emenate from a court of justice—and never does.

(8) MANDAMUS AGAINST THE BOARD.

In his petition, relator alleges he has no plain, speedy or adequate remedy and prays for mandamus to compel the canvassing board to reject the returns from six specified precincts and for a restraining order pending final decree.

In the Alaska case of Interstate Com. Com. *v.* Humboldt Steamship Co., 224 U. S. 474, the Supreme Court of the United States has clearly stated the rule which must govern this class of cases:

> "The general principle which controls the issue of a writ of mandamus is familiar. It can be issued to direct the performance of a ministerial act, but not to control discretion. It may be directed against a tribunal or one who acts in a judicial capacity to require it or him to proceed, the manner of doing so being left to its or his discretion. * * * But if it absolutely refuse to act, deny its power, from a misunderstanding of the law, it cannot be said to exercise discretion."

In that case the Interstate Commerce Commission refused to act, denied its power and jurisdiction and refused to move; the court held mandamus might issue to compel it to move, "the manner of doing so being left to its or his direction."

> Interstate Com. Com. *v.* Humboldt, 224 U. S. 474.

McCrary on Elections, 4th Ed. lays down the same rule in respect to mandamus in election cases:

> "Sec. 377. Where the law creates a board of canvassers with power to determine from the returns who is elected representative in Congress, the only remedy open to a person aggrieved by the decision of such board is by a contest before the House of Representatives. Mandamus is not available in such a case."
>
> O'Hara *v.* Powell, 80 N. C. 103.
>
> Wheeler *v.* Board Canvassers, 94 Mich. 447.
>
> "Sec. 385. The court will not undertake to decide upon the

right of a party to hold a seat in the legislature, where by the Constitution each House is made the judge of the election and qualifications of its own members; but court may by mandamus, compel the proper certifying officers to discharge their duties and arm the parties elected to such legislative body with the credentials necessary to enable them to assert their rights before the proper tribunal. And, inasmuch as canvassing and returning officers act ministerially, and have no power to go behind the returns, or inquire into the legality of votes cast and returned, a court will by mandamus compel them to declare and certify the result *as shown by the returns,* because that is their plain duty, but the award of a certificate of election under such mandate will not conclude the legislative body in determining the election.

"Sec. 386. * * * And it has been held that such a court has no power to try a contested election even where the statute has provided no mode of contesting. And the same court has held that a writ of injunction issued to restrain the officers of an election from holding an election, or to restrain a board of canvassers from canvassing the returns of an election, and declaring the result, is absolutely void for want of power in the court, and that such officers cannot be punished for disobedience thereto. The doctrine announced is that courts of equity have no inherent power to try contested elections, and can only exercise such power where it has been conferred by express enactment, or necessary implication therefrom.

"Sec. 387. It has been held as already seen (Sec. 370) that a court of chancery should not interfere by injunction to restrain the officers of election from counting illegal votes, or from issuing certificates of election to persons not entitled to them. The reason is that a court of chancery will not interfere collaterally and in advance of a contest to pass upon the claims of conflicting claimants of an office.

"Sec. 411. The rule is that mandamus will lie to compel election officers to discharge purely ministerial functions as contradistinguished from such duties as are quasi judicial in their character. The duties of returning officers are purely ministerial, but in the nature of the case they must exercise a sort of judicial function in determining whether the papers received by them and purporting to be returns are in fact such, and are genuine and intelligible and substantially as required by law. But after these questions are determined, the duty of counting the votes as returned, and declaring the result, is a ministerial duty which the proper officers are bound to perform, and the performance of which may be compelled by mandamus. And it is not doubted that even as to questions concerning which returning officers exercise a discretion, they can be compelled by mandamus to act and to decide, though their discretion cannot be controlled by this means, and they cannot, therefore, be directed by mandamus as to how they shall decide. If they decide

any such questions wrongfully or erroneously, the party injured has his remedy by quo warranto or by such other form of remedy as may be provided by statute.

"Sec. 416. And of course, it will be understood from what has already been stated, that where, as is sometimes the case, large judicial powers are conferred by law upon canvassing boards, mandamus will not lie to direct or control them in the exercise of their judicial or discretionary functions. It must be constantly borne in mind that the office of this writ is to compel the performance of acts which are purely ministerial in their nature, though it may, as we have said, be employed to compel, but not to control, the exercise of judicial functions. This rule being kept in view, no serious difficulty can arise upon this subject.

"Sec. 423. We gather from all the authorities the following rules:

1. If the officers of election refuse or fail to act, mandamus will compel them to discharge their duties as required by statute; but in such cases the writ will not, as a general rule, command such officers to certify that any particular person has been elected.

2. If there are two or more persons claiming the office, the writ will never issue to require such officers to declare either one elected, but only to comand them to execute the duties and exercise the functions conferred upon them by law.

3. If it clearly appears that a particular person has received the majority of the votes cast, and that no question is made upon this point, perhaps mandamus may issue to compel such officers to certify the election of that person by name, although this is substantially the same thing as to order them to certify the result according to law, and therefore the latter form will always be found to be the best.

McCrary on Elections, 4th Ed. Secs. 377-423.

"It is an elementary rule that a writ of mandamus may be used to require an inferior court to decide a matter within its jurisdiction and pending before it for judicial determination, but not to control decision. Ex parte Flippin, 94 U. S. 350; ex parte Railway Co., 101 U. S. 720; ex parte Burtis, 103, U. S. 238."

Ex parte Morgan, 114 U. S. 174, 175.

In the case of Interstate Commerce Commission *v.* Humboldt Steamship Co., 224 U. S. 474, heretofore cited, the court concluded:

"In the case at bar the Commission refused to proceed at all, though the law required it to do so; and to so do as required—that is, to take jurisdiction, not in what matter to exercise it—is the effect of the decree of the Court of Appeals, the order of the court being that a peremptory writ of mandamus be issued directing the Commission 'to take jurisdiction of said cause and proceed therein as by law required.' In other words, to proceed to the merits of the

> controversy, at which point the Commission stopped because it was 'constrained to hold,' as it said 'upon authority of the decision recently announced in In the Matter of Jurisdiction over Rail and Water Carriers Operating in Alaska, 19 I. C. C. Rep. 81, that the Commission is without jurisdiction to make the order sought by complainant,' the steamship company."

And that was the limit of the power of the court, if it had jurisdiction at all, in the case of Sulzer *v.* The Canvassing Board. The court had no authority or jurisdiction in mandamus to do more than compel the Canvassing Board "to take jurisdiction of said cause and proceed therein as by law required." The Supreme Court of the United States stops at that point, and the authorities are unanimous that the jurisdiction of every other court can not go beyond it, and by a writ of mandamus try the case, and compel the court's judgment on the trial to be entered as that of the canvassing board itself, as was done in this case.

And now I appeal from Phillip drunk to Phillip sober'; from the judge filled with the passion of politics to the same judge controlled by his own better and sober judgment. As judge of the district court of Alaska he has written two opinions on the principle which governs in mandamus against public officials; the Surveyor General Davidson was defendant in both cases. So the Committee and House may have a better view of the contrast between these two opinions they are here printed in paralell columns:

Dispatch Pub. Co. v. Davidson. 4 Alaska 727.

"Jennings, District Judge. Will a mandamus lie in this case? I think not.

Speaking of the writ of mandamus, the law of Alaska provides as follows:

'It may be issued to any inferior court, corporation, board, officer, or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. But though the writ may require such court, corporation, board, officer, or person to exercise its or his judgment, or proceed to the discharge of any of its or his functions, it shall not control judi-

Sulzer v. The Canvassing Board, In the Record.

"Jennings, District Judge. This is a proceeding by mandamus to compel the Canvassing Board, consisting of J. F. A. Strong (Governor), Charles E. Davidson (Surveyor General), and John F. Pugh (Collector of Customs), of the district of Alaska, to reject—i. e.—not count the votes or alleged votes from certain precincts for the office of Delegate in Congress from Alaska, and to issue to Charles A. Sulzer, a certificate of election to said office."

* * * * * *

"To recapitulate then, the Canvassing Board must not count the returns from Chog-

cial discretion. The writ shall not be issued in any case where there is a plain, speedy, and adequate remedy in the ordinary course of the law. Comp. Laws 1913, Sec. 1385; Carter's Code, Sec. 553, p. 261.'

"Our statute is taken bodily from that of Oregon, passed October 11, 1862. In the case of Ball v. Lappins, 3 Or. 56, it was said by the Oregon court, in 1868, speaking of the writ of mandamus:

'It may require the officer to proceed to the discharge of any of his functions, although such discharge involves an exercise of discretion and judgment, and a choice between different modes of proceeding; yet it 'shall not control judicial discretion.' And it is safe to go further, and say it shall not control discretion, judicial or otherwise, which the law assigns to an officer. * * * In such case the office of the writ is to compel the officer to act. The mode of action is still to be determined by him in whom the law has lodged the discretionary power. In determining on the necessity and propriety of the writ, it must be observed: (1) Mandamus is proper only where a party has a legal right, and there is no other legal remedy; * * * (2) The right must be certain and clearly made out by the facts of the case."

"And in Durham v. Monumental S. & M. Co., 9 Or. 44, the same court said, in 1880:

"The law "provides that the writ shall not be issued in any case where there is a plain, speedy, and adequate remedy at law. The existence or nonexist-

ging, Nushagak, Bonnifield, Utica, Deering or Vault. These precincts total Wickersham 69, Sulzer 19.

"It is suggested by Mr. Rustgard that if the Court had before it the returns from all the precincts in Alaska it might appear that there were defects in the returns from other precincts, sufficient in gravity and number to turn the result obtained if the ballots (?) in the precincts discussed herein, were rejected.

"This, of course, is possible but the pleadings disclose nothing of that nature. On the contrary the answers allege that counting the precincts heretofore adverted to Wickersham has 6490 votes, and Sulzer has 6459; that the Canvassing Board has finished the canvass of all votes and was about to issue a certificate of election to Wickersham when the alternative writ was served upon them.

"It is obvious that if the votes be rejected which the Court has decided should be rejected, Wickersham's 6490 will suffer a diminution of 69, leaving him only 6421, and Sulzer's 6459 will suffer a diminution of 19, leaving him 6440—in which event the certificate of election should go not to Wickersham but to Sulzer.

"The demurrer will be sustained."

"Judge's Chambers,
Juneau, March 22, 1917.

Hon. J. F. A. Strong, Governor, and Hon. Charles E. Davidson, Surveyor General, of the Territory of Alaska, Juneau, Alaska.

"Gentlemen:

At your request, as I am in-

ence of an adequate and specific remedy at law under the ordinary forms of legal procedure is therefore one of the first questions to be determined in all applications for the writ of mandamus; and wherever it is found that such remedy exists, and that it is open to the party aggrieved, the courts uniformly refused to interfere by the exercise of this extraordinary jurisdiction.'

"It will be noted that in the Oregon case first cited the court says that 'it is safe to go further and say it shall not control discretion, judicial or otherwise.'

"In United States v. Black, 128 U. S. 40, 9 Sup. Ct. 12, 32, L. Ed. 354, which was an application to the Supreme Court of the District of Columbia for a writ of mandamus commanding the Commissioner of Pensions to grant an increase of pension, the petitioner averred that the fact was that he was so disabled that he was entitled to this increase under the acts of Congress, and that the Commissioner had so found the fact to be, but had erroneously held that under the law he was not entitled to it, and for that reason he refused to allow it. In deciding the case against allowance of the writ, Mr. Justice Bradley said:

'The principle of law deducible * * * is not difficult to announce. The court will not interfere by mandamus with the executive officers * * * in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appelate power for that purformed, the Clerk of this court has brought to my attention a certain communication signed by you, in which you state that a protest has been filed with the Canvassing Board by Mr. Emery Valentine of this city, suggesting the rejection of the votes of certain precincts cast at the last election for Delegate to Congress, and in which you state that the 'Board begs to submit the protest herein referred to and respectfully asks to be instructed as to what disposition the said Board should make of said protest,' and in reply I have to state:

* * * * * *

"The above entitled cause is a proceeding brought in this Court for the issuance of a mandamus compelling you to reject —i. e. not count the returns from certain precincts stated in the petition on account of certain alleged *fatal defects*—not irregularities, but defects—in the return from said precincts. An alternative writ of mandamus was issued and served upon you, and you were also enjoined from issuing the certificate of election to James Wickersham."

* * * * * *

"It appears that in the 6490 votes which you have credited to James Wickersham, and in the 6459 votes credited to Charles A. Sulzer, and in the 1346 votes credited to Lena Morrow Lewis, you counted votes from the precincts questioned in the petition and which the Court has decided should be rejected, and in your answer you stated that you had completed the canvass.

"In view of the allegations of the answer and of what Mr.

pose; but, when they refuse to act in a case at all, * * * a mandamus may be issued to compel them 'to do so.' Judged by this rule the present case presents no difficulty. The Commissioner of pensions did not refuse to act or decide. He did act and decide. He adopted an interpretation of the law adverse to the relator."

"And he adds:

'Whether, if the law were properly before us, * * * we should be of the same opinion, or a different opinion, is of no consequence in the decision of this case.'"

"In Kimberlin v. Commission to Five Civilized Tribes, 104 Fed. 655, 44 C. C. A. 110, Circuit Judge Sanborn said:

'The writ of mandamus issues to compel the performance of a plain duty imposed by law. Where that duty is the exercise of judgment or discretion by an officer in the decision of a question of law or fact, or both, it may issue to compel a decision, but it may not command him in what particular way that decision shall be rendered. When a question has been decided by the officer or person to whose judgment the law has intrusted its determination, the writ of mandamus may not issue to review or reverse that decision, or to compel another.'"

"The case of Decatur v. Paulding, 14 Pet. 497, 10 L. Ed. 559, was one in which it was argued that 'the true construction' of certain legislation 'constituted the law of the case,' and that, as the facts were not in dispute, the compliance by the officer with the law was a mere

Davidson stated in open court, the Court concluded that all other questions had been passed upon by you and that you had indeed completed your 'canvass and compilation' and 'that the official tally sheets made up by the Board were duly totalled and checked.' Now you state in your communication to me that some private citizen has lately entered a protest of some kind and that there are some *irregularities* which have not entered into the case that has been heard before me, and on which I issued the alternative writ, and you ask my advice as to what you shall do."

* * * * * *

"Yours very respectfully,

ROBERT W. JENNINGS,

Judge."

"Peremptory Mandamus.

* * * * * *

"Whereas, the Court is astisfied that the defendants do not desire or intend to show any further cause, and doth now find from the records and files herein that if the total number of votes to which the Canvassing Board has returned that James Wickersham is entitled to (to-wit: 6490) and that Charles A. Sulzer is entitled to (to-wit: 6459) should suffer a reduction of 69 and 19 respectively, it will clearly appear that Charles A. Sulzer has received the greatest number of votes for the office of Delegate to Congress from Alaska, and that he is entitled to the certificate of election therefor; and,

"Whereas, the Court doth further find that with the exception of making the deduction aforesaid and of issuing said certifi-

ministerial act, and he had no power to exercise his judgment or discretion in the construction of the act; but Chief Justice Taney denied the writ, saying:

"The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress, under which he is required, from time to time, to act."

* * * * * *

"Mandamus denied."

cate said Board has completed the canvass; and,

"Whereas, the Court, on motion of plaintiff this day made has issued an order making said alternative writ peremptory;

"Therefore, this is to command you, and each of you, that upon receipt of this writ of mandamus you do forthwith convene as a Canvassing Board for the Territory of Alaska, and that you reject the votes from said precincts of Choggiung, Deering, Nushagak, Utica, Bonnifield, and Vault, and that you issue a certificate of election to Charles A. Sulzer as having received the greatest number of votes for Delegate to Congress from Alaska, and that said certificate be in the *usual form*, as by law provided.

"And this you are in nowise to omit.

"Given under my hand and the seal of this Court this 23rd day of March, 1917.

(Seal) ROBERT W. JENNINGS,
Judge."

It would be impossible in the history of American courts to point to a more glaring instance of "Dr. Jekyl and Mr. Hyde" judicial pronouncement than is exhibited in these two opinions of this Alaskan judge. In the Dispatch case, where his political rancor had no play, he correctly stated the rules which all American courts follow: in the Canvassing Board case he violated every such rule, and the rule of parties and equity in addition. Contestant in this case appeals from the partisan decision in the Canvassing Board case to the admittedly correct rule stated in the Dispatch case. The Dispatch case is governed by law: the Canvassing Board case by power in the hands of a petty politician.

A mandamus will not be awarded to compel officers to do any act which they are not authorized to do by the law from which they derive their powers.

Carroll Co. v. United States, 18 Wall. 71.

United States v. Clark Co., 95 U. S., 769.
United States v. Macon Co., 99 U. S., 582.
Ex parte Rowland, 104 U. S., 604.

The act of Congress creating the Canvassing Board for Alaska specifically limits its authority and power "to canvass and compile in writing the vote specified in the certificates of election returned to the Governor from all the several election precincts as aforesaid." Sec. 12. Act May 7, 1906, 34 Stat. L., 169 (173). And even if the District Court in Alaska may issue mandamus against the Governor and the Board, that is the extent of its power, under the universal rule laid down by the Supreme Court of the United States. The court could only require them to act—to move on and to canvass and compile the whole of the "vote specified in the certificates of election returned to the Govrnor from all the several election precincts as aforesaid." The Board's duties are those of an adding machine, and they may be compelled to add, but not to try title to the office, to reject returns, and issue a certificate to a defeated candidate upon hair-splitting questions of law!

(9) ANOTHER PLAIN REMEDY AT LAW.

In his opinion in the case of Dispatch Pub. Co. v. Davidson, 4 Alaska, 727, Judge Jennings quotes section 1385 of the Compiled Laws of Alaska, 1913, authorizing the issue of the writ of mandamus in specified cases, but the last paragraph of which declares:

"The writ shall not be issued in any case where there is a plain, speedy, and adequate remedy in the ordinary course of the law."

He then stated, correctly, the fact that the Alaska law was taken bodily by Congress from the laws of Oregon, which makes the prior Oregon decisions binding as the law of the case. He then quotes from Oregon cases, the first of which, Ball v. Lappins, 3 Ore., 56, declared:

> "In such case the office of the writ is to compel the officer to act. The mode of action is still to be determined by him in whom the law has lodged the discretionary power. In determining on the necessity and propriety of the writ, it must be observed: (1) Mandamus is proper only where a party has a legal right, and there is no other lawful remedy: * * * (2) The right must be certain and clearly made out by the facts of the case."

He then quoted with approval from Durham v. Monumental S. & M. Co., 9 Or., 44, where that court held:

> "The law provides that the writ shall not be issued in any case

where there is a plain, speedy and adequate remedy at law. The existence or non-existence of an adequate and specific remedy at law under the ordinary forms of legal procedure is therefore one of the first questions to be determined in all applications for the writ of mandamus, and wherever it is found that such remedy exists, and that it is open to the party aggrieved, the courts uniformly refused to interfere by the exercise of their extraordinary jurisdiction."

This statutory and universal rule was specially called to Judge Jennings' attention in the case of Sulzer v. The Canvassing Board, but he refused to follow or apply it, saying:

"The third point raised by Mr. Rustgard is that mandamus will not lie because there is a remedy by contest before the House of Representatives. This contention fails to appreciate the true object and purpose of the action. The object of this proceeding is to obtain the certificate of election—that is, *prima facie* evidence. It is not to put one man out and put the plaintiff in. A mandamus will not lie for such purposes as that, for that is for the House fo Representatives to determine; but no other process or proceeding can give the specific relief which plaintiff claims to be entitled to here."

Now, Judge Jennings admits that mandamus is not the proper remedy "to put one man out and put the plaintiff in," but that is eactly what he did in the Sulzer case. He declared his only object was to throw out and reject the returns from precincts and thereby to give Sulzer the certificate of election! And that is what he did, thereby putting "one man out and put the plaintiff in." That is exactly what the certificate of election does. It is not merely "*prima facie* evidence," as he called it, but it is the commission—the insignia of the office, armed with which Sulzer came to Washington, presented it to the House of Representatives and was sworn in and took his seat as Delegate as a matter of law and right. It was the title to the office and gave Sulzer the possession thereof without question. It was much more than "*prima facie* evidence"—it was the commission, the title to the office itself. With it he was the officer, without it contestant is a private citizen.

No member of the House of Representatives can be misled by such sophistry as that in Judge Jennings' argument. If that is the law, it follows that any State court may at the suit of any defeated candidate for Congress, who brings a suit against the Canvassing Board, compel the Board, by rejecting returns enough, to issue the certificate of election to one whom the people did not elect, whom the Canvassing Board found was not elected by the ballots, and thereby force the elected candidate to carry on a long and expensive contest before the

House to regain, if he can, what he had the right to in the first instance, the commission and office represented thereby. No such case can be found in American jurisprudence except that so decided by the partisan Alaskan judge.

But Congress has provided "a plain, speedy, and adequate remedy in the ordinary course of law" for a defeated candidate for Congress who wishes to gain the office if he thinks he has been unlawfully defeated. That remedy is found in those statutes passed by Congress in Chapter 8 of the U. S. Revised Statutes, 1878, and acts amendatory thereof.

Section 105 of that chapter provides:

> "Sec. 105. Whenever any person intends to contest an election of any member of the House of Representatives of the United States, he shall, within thirty days after the result of such election shall have been determined by the officer or board of canvassers authorized by law to determine the same, give notice, in writing to the member whose seat he designs to contest, of his intention to contest the same, and in such notice shall specify particularly the grounds upon which he relies in the contest."

The other sections following 105 provide a plain, speedy, and adequate remedy in the ordinary course of the law. Such statutory remedy was provided by Congress, and is exclusive, as the courts have uniformly held. Assuming that Chapter 8 of the U. S. Rev. Stat., 1878, is a plain, speedy, and adequate remedy, it follows that the district court in Alaska had no jurisdiction in mandamus. If that court had such jurisdiction, it follows that a similarly constituted State court would have, but the Supreme Court of the United States, in In re Loney, 134 U. S., 372, has held to the contrary:

> "The courts of a State have no jurisdiction of a complaint for perjury in testifying before a notary public of the State upon a contested election of a member of the House of Representatives of the United States; and a person arrested by order of a magistrate of the State on such a complaint will be discharged by writ of habeas corpus."

See also New York v. Eno, 155 U. S., 89 (97).

The reason why the State courts have no jurisdiction of a complaint or indictment for perjury in a case of Congressional contested election is that such courts have no jurisdiction to try the case—there is another forum provided for such trials, to-wit, a contest before the House of Representatives itself. Not even a United States court has jurisdiction to try such a case: the Constitution, Art. I, Sec. 5, provides that "each House shall be the judge of the elections, returns, and qualifications of its own members."

(10) WHAT JUDGE JENNINGS DECIDED, AND WHY!

In his long opinion in the case of Sulzer v. The Canvassing Board, Judge Jennings pretended to consider, and did decide only two vital or important points, viz.: (1) The validity of the return from Vault precinct, and (2) the validity of the several returns from the precincts of Choggiung, Nushagak, Utica, Deering and Bonnifield. The return from Vault was ordered to be rejected for one alleged defect, and the several returns from the other five precincts for another and different supposed defect common to the five.

POINT NO. 1—VAULT PRECINCT REJECTED.

Probably nothing in this record shows the utter want of efficiency and fairness of the judge as clearly as his action in regard to the Vault precinct returns. Certainly nothing can more clearly demonstrate the danger of allowing a narrow-minded political judge to mutilate the record and control the action of competent canvassing officers than what follows. Judge Jennings makes the following statement of alleged facts in his opinion in the Canvassing Board case (italics mine):

"VAULT.

> "As to the precinct of Vault, the allegation of the petition is that 'no certificate of the result of the election in said precinct specifying the number of votes cast for each candidate accompanied or was included in said returns.' *It is admitted in the answer of the Canvassing Board that the judges did not sign any such certificate*, but it is further alleged that 'the canvassing board received from the Clerk of the United States District Court for the Fourth Judicial Division in which said precinct is located, the "certificate of clerk to election returns," bearing the names of the election judges for said voting precinct and duly certified by the clerk of the court as a full, true and correct copy of the original on file in his office.'"

Upon this incorrect assumption of fact the Court then declared (italics mine):

> "*It will be seen that the said two members of the Canvassing Board say in substance that they received no returns from the election board and proceeded to canvass a certified copy of some certificate made by the clerk of the election.* If they did, then what they canvassed was not properly authenticated. It is not the clerk who is to sign the certificate of election—it is the election board; consequently the certificate of the clerk of the election to the Clerk of the Court is not the certificate required by law."

He then quotes some law to sustain his possition and concludes:

> "The returns from Vault, then, not being authenticated by the

proper officers, cannot be canvassed. Vault totals Wickersham 8, Sulzer 2."

Whereupon he peremptorily ordered the Canvassing Board to reject these returns and disfranchise the voters of Vault precinct.

Sections 11 and 12 of the Act of Congress of May 7, 1906, providing for the election of a Delegate from Alaska contain the provisions which govern the matter in question.

Section 11 provides that immediately after the close of the election the precinct election board shall canvass the vote and "*they shall thereupon, under their hands and seals, make out in duplicate a certificate of the result of said election, specifying the number of votes, in words and figures, cast for each candidate*," and shall send one copy to the Governor and the other to the Clerk of the District Court, in the Division where the precinct is situated.

Section 12 then provides that the canvassing board shall "canvass and compile in writing the vote specified in the certificates of election returned to the Governor from all the several precincts as aforesaid." * * * *In case it shall appear to said board that no election return as hereinbefore prescribed has been received by the Governor from any precinct in which an election has been held, the said board may accept in place thereof the certified copy of the certificate of election for such precinct received from the clerk of the court, and may canvass and compile the same with the other election returns.*"

And all that was done in exact compliance with law for Vault precinct, by the Canvassing Board. When the Board received the first copy of the Vault returns it was seen that the election board at Vault had failed to sign their names to the certificate of result.

So the Governor, under the provisions of section 12 last above quoted, telegraphed to the Clerk of the Court at Fairbanks, Alaska, for a certified copy of the duplicate certificate filed with the Clerk of the Court there, under the law. The clerk of the court at Fairbanks, forwarded a "*certified copy of the certificate of election*" so held by him by duplicate copy, to the Governor and it was properly used by the Board in the canvass and compilation of the return from Vault precinct. *In short, in place of the original defective return the board used, canvassed and compiled "the certified copy of the certificate of election for such precinct received from the Clerk of the Court"* at Fairbanks, Alaska.

And in the Answer of Governor Strong and Surveyor General Davidson, they alleged in explanation of the charge that the returns from Vault were defective (italics mine):

"3.

"That in the canvass of the returns from the voting precincts

named in the alternative writ of mandamus herein, and in the petition filed in this cause, the following irregularities were found in the returns from the respective precincts: * * * Vault, in the case of Vault voting precinct, the election judges did not sign the certificate of result form in the back of the Election Register and Tally Book, *but the canvassing board received from the clerk of the United States District Court for the Fourth Judicial Division, in which said precinct is located, the 'certificate of the clerk to election returns,' bearing the names of the election judges for said voting precinct, and duly certified by the clerk of the court as a full, true, and correct copy of the original on file in his office.*"

Judge Jennings assumed (or pretended to) that the foregoing allegation had reference to "some certificate made by the clerk of the election," and on that hypothesis declared "it is not the clerk who is to sign the certificate of election," etc. But that was neither the allegation in the answer nor the fact. There was no certificate from any clerk of election before him or the canvassing board, either. He did not "stop, and look, and listen." It is possible he was misled by the use of the phrase that the canvassing board had received from the clerk of the court "the certificate of the clerk to election returns," bearing the names of the election judges for said voting precinct, and duly certified by the clerk of the court," &c. But that allegation made no mention of any "clerk of election" and was not meant to.

As a matter of truth and fact what the Board in its Answer correctly described was the document then before the Canvassing Board and mentioned in section 12 of the Act of Congress May 7, 1906, as "the certified copy of the certificate of election for such precinct received from the clerk of the court," at Fairbanks, Alaska, and not any certificate signed by a "clerk of election."

Here is a copy of the document so far as it covers the vote for Delegate under the certificate of both the Clerk of the Court and the Governor and ex-officio Chairman of the Canvassing Board, and it only needs a moment's inspection and comparison with the statutory requirement to see that it was and is "the certified copy of the certificate of election for such precinct received from the clerk of the court," and that it was properly canvassed and compiled by the Board, as by law required.

"CERTIFICATE OF CLERK TO ELECTION RETURNS.

UNITED STATES OF AMERICA,
Territory of Alaska,
Fourth Division. } *ss.*

We, the undersigned, hereby certify that the following is a true and correct certificate of the result of the November, 1916, elec-

tion for 'Delegate to Congress,' 'Attorney General for Alaska,' 'Members of the Legislature of the Territory of Alaska,' 'Road Commissioner,' and 'For or against a general eight-hour law,' and 'Against or in favor of the manufacture or sale of intoxicating liquors in Alaska after January 1, 1918,' held in the Vault Voting Precinct of the Fairbanks Recording District, Fourth Division, Territory of Alaska.

Of which for Delegate to Congress—

1. Lena Morrow Lewis	received	three	(3)
Name of Candidate		Words	Figures
2. Charles A. Sulzer	received	two	(2)
Name of Candidate		Words	Figures
3. James Wickersham	received	eight	(8)
Name of Candidate		Words	Figures

* * * * * * *

Dated at Vault, this 7th day of November, 1916.

JAMES WILSON,
NETTIE VANBERLO,
WILLIAM WILEY,
Election Board."

UNITED STATES OF AMERICA,
Territory of Alaska.
Fourth Division. } *ss.*

"I, the undersigned Clerk of the District Court for the Territory of Alaska, Fourth Division, do hereby certify that the above and foregoing is a full, true and correct copy of the original certicate of results of the November 7th, 1916, election for 'Delegate to Congress,' 'Attorney General of Alaska,' 'Members of the Legislature of the Territory of Alaska,' and 'Road Commissioner,' and 'For or Against a General Eight-Hour Law,' and 'Against or in Favor of the Sale of Intoxicating Liquors in Alaska after January 1, 1918,' of the VAULT Voting Precinct of the Fairbanks Recording District, as the same appears on file and of record in my office.

In Testimony Whereof, I have subscribed my name and affixed the seal of the said Court at Fairbanks, Alaska, this 11th day of November, 1916.

(SEAL.) J. E. CLARK, *Clerk.*

....., *Deputy.*"

"TERRITORY OF ALASKA,
Governor's Office,
Juneau.

UNITED STATES OF AMERICA, } *ss.*
Territory of Alaska. }

I, J. F. A. Strong, Governor of the Territory of Alaska, and Chariman of the Territorial Canvassing Board, hereby certify that the foregoing document, consisting of three (3) pages, is a full, true and correct copy of the 'CERTIFICATE OF CLERK TO

ELECTION RETURNS,' as received from the Clerk of the District Court at Fairbanks, Alaska, and on file in the office of the Governor of the Territory, with the returns received from the election board of the Vault Voting Precinct of the Fairbanks Recording District, Fourth Division of Alaska, covering the election held in said Vault Voting Precinct on the 7th day of November, 1916, for Delegate to Congress and for other purposes.

In Testimony Whereof, I have hereunto subscribed my name this 29th day of March, A. D. 1917, at Juneau, the Capital of Alaska, and caused the seal of the Territory to be affixed hereto.

J. F. A. STRONG,
Governor of Alaska, and Chairman of
Territorial Canvassing Board.

(SEAL.)

Attest:

Charles E. Davidson,
Ex-officio Secretary of Alaska."

It may be this document was not as accurately described in the Answer as if the Canvassing Board had been able to have the services of an attorney, but if Judge Jennings had examined it and compared it with the United States statute as he should have done and would have done if he had been intent on doing justice, he would not have made such a glaring and stupid error. The Canvassing Board understood and correctly canvassed and compiled "the certied copy of the certificate of election for such precinct received from the clerk of the court," but Judge Jennings stupidly rejected it, though it was in the exact form required by the statute, and thus disfranchised the electors in Vault precinct and injured this contestant, because he was too partisan and unjust to look and see what the document he denounced really was.

POINT NO. 2—FIVE OTHER PRECINCTS REJECTED.

The judge compelled the Canvassing Board to reject the entire returns from Choggiung, Nushagak, Utica, Deering and Bonnifield precincts because the voters there used the Congressional form of ballot, and the election officers did not send a certificate stating the reason why they so used them. There was no fraud alleged, no wrongdoing on the part of either the voters or the election officers—just the want of a certificate of explanation, and that certificate was not required by the law of Congress which governs the election.

Section 9 of the Act of Congress of May 7, 1906, "An Act providing for the election of a Delegate to the House of Representatives from the Territory of Alaska." 34 Stat. L., 169 (172), provides (italics mine):

"Sec. 9. * * * *The voting at said election shall be by printed*

or written ballot. The ballot at said first election shall be substantially in the following form:

For Delegate from Alaska.

For the short term (here insert the name of the person voted for.)
For the long term (here insert the name of the person voted for.)
At all elections after said first election the ballot shall be substantially in the following form:

For Delegate from Alaska.

(Here insert the name of the person voted for.)"

Under that law the electors in Alaska cast their ballots from 1906 to 1916, and they were heretofore always honestly counted, canvassed and compiled.

But the Alaska Legislature concluded to amend that Act of Congress, and it did so by the Act of April 27, 1915, entitled "An Act to provide official ballots for elections in the Territory of Alaska." Sess. Laws of Alaska, 1915, pp. 55-66. This territorial law provided for the printing of an official Territorial ballot and for using them at all elections for all candidates including those for Delegate to Congress and Members of the Legislature. While this Act provided for printing and using an official territorial ballot, it also recognized the necessity for, and the validity of, the Congressional ballot provided in the Act of Congress of May 7, 1906.

Section 21 of the Legislative Act provides (italics mine):

> "Sec. 21. That in any precinct where the election has been legally called and no official ballots have been received, *the voters are permitted to write or print their ballots*, but the judges of election shall in this event certify to the facts which prevented the use of the official ballots, which certicate must accompany and be made a part of the election returns."

And the voters in Choggiung, Nushagak, Utica, Deering, and Bonnifield precincts wrote or printed their own ballots, or in some cases used sample ballots or those printed and sent to them by Mr. Sulzer, and the judges of election in those precincts did not certify to the facts which prevented the use of the Territorial form of ballots in time so the certificates could "accompany and be made a part of the election returns." And for that reason, and that only, the judge held the returns fatally defective and ordered them to be rejected by the Canvassing Board. On the total vote this contestant had a majority of 31 votes over Sulzer; in these 5 precincts contestant had 60 votes and Sulzer 17, my majority being 43 votes. All being rejected gave Sulzer a majority of 12 votes and the election!

In issuing his mandate against the Governor and other members of

the Canvassing Board to compel them to reject the entire returns from these five precincts, Judge Jennings assumed the Act of the Legislature of 1915 was valid and that the Legislature had authority to alter, amend, modify and repeal the Congressional election laws of 1906 and 1912.

But that assumption is not correct, for Congress, in sections 5 and 17 of the Act of Congress of August 24, 1912, specially limited the power of the Legislature of Alaska in that regard. The Act mentioned is one of the fundamental laws of Alaska; it is the Organic Act "to create a Legislative Assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes," 37 Stat. L., 512.

Section 5 of that Act provides (italics mine):

> "Sec. 5. * * * * *that the qualifications of electors, the regulations governing the creation of voting precincts, the appointment and qualifications of election officers, the supervision of elections, the giving of notices thereof, the form of ballots, the register of votes, the challenging of voters, and the returns and the canvass of the returns of the result of all such elections for members of the legislature shall be the same as those prescribed in the Act of Congress entitled 'An Act providing for the election of a Delegate to the House of Representatives from the Territory of Alaska' approved May seventh, nineteen hundred and six, and all the provisions of said Act which are applicable are extended to said elections for members of the legislature, and shall govern the same, and the canvassing board created by said Act shall canvass the returns of such elections and issue certificates of elections to each member of the said legislature;*" etc.

Section 17 of the Act of August 12, 1912, aforesaid, again referring to the Act of May 7, 1906, provides:

> "Sec. 17. Election of Delegate. * * * *and all of the provisions of the aforesaid Act shall continue to be in full force and effect and shall apply to the said election in every respect as is now provided for the election to be held in the month of August therein: Provided, That the time for holding an election in said Territory for Delegate in Alaska to the House of Representatives to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by an act passed by the Legislature of the Territory of Alaska; Provided further, That when such election is held it shall be governed in every respect by the laws passed by Congress governing such election.*"

The Supreme Court of the United States has held that the Reports prepared by Committees of Congress having the duty of examining and

reporting bills referred to them for that purpose may be consulted as an aid to ascertaining the motive of Congress in passing a statute.

McLean v. United States, 226 U. S., 374.

The Act of August 24, 1912, was H. R., 38, in the 62d Congress, 2d Session, and in the Conference Report, H. Rept., 1212, is this statement signed by the managers on the part of the House:

> "Amendment No. 67 is a new section changing the date of the election for Delegate to Congress from Alaska from the month of August so that it shall be held on the Tuesday next after the first Monday in November in 1914, and every two years thereafter, *so that the Delegate election and that for members of the Legislature may then and thereafter be held at the same time under the same law passed by Congress.*"

There is no doubt about the intention of Congress in inserting sections 5 and 7 in the Act creating the Alaska Legislature. The purpose was to preserve the United States Election Law of May 7, 1906, for the election of Delegate from Alaska, and to extend its provisions to the election of members of the Legislature. The Act of 1912 was an Organic Act, for the creation of the Legislature with power "to alter, amend, modify, and repeal" certain laws theretofore passed by Congress establishing civil and criminal codes in the Territory. To prevent the Legislature from having power to "alter, amend, modify, and repeal" the election laws the provisions of section 5 and 17 were inserted and made to cover every head found in the Act of May 7, 1906, relating to elections.

It is, then, unnecessary to examine into the minute details of the court's opinion in the suit of Sulzer *v.* The Canvassing Board, in its relation to the Act of the Territorial Legislature, "An Act to provide official ballots for elections in the Territory of Alaska." Sess. Laws of Alaska, 1915, pp. 55-66, because the Act is void, in so far as it attempts to "alter, amend, modify or repeal" the Congressional election laws for the election of Delegate to Congress and members of the Legislature, being in direct conflict with the Act of Congress creating the Alaska legislature. A legislature cannot alter, amend, modify and repeal the Constitution, or the Organic Act creating it, and especially where it is expressly forbidden to do so in the Constitution or Organic Act itself.

And with respect to the defect upon which Judge Jennings rejected Utica and Deering precincts in the Nome division, the Governor and Surveyor General, a majority of the Canvassing Board, in their Answer, alleged the receipt by the Board of a telegram from the Clerk

of the Court at Nome, saying he had then in his office the certificate of the judges of election of Utica and Deering precincts explaining why the Territorial or so-called official ballots had not been used in those precincts, and same was being forwarded. Here is a duly certfiied copy of that document, under the hands and seals of the Clerk of the Court, and the Governor and Surveyor General of Alaska:

"G. A. Adams, Clerk.

DEPARTMENT OF JUSTICE.
Office of
Clerk of the District Court,
for the
Second Division, District of Alaska.
Nome, Alaska.

February 12, 1917.

J. F. A. STRONG, *Governor*,
Chairman, Canvassing Board,
Juneau, Alaska.

Sir:

I have the honor to forward herewith a certified copy of affidavit of John Petrich and certificate of Alfred S. Kepner, Judges of Election, Deering voting precinct, and a certificate of the Judges of election of the Utica Voting Precinct, Second Division, in the matter of using special ballots at the General 1916 Election in their respective precincts.

Advisory telegram sent you this day.

Yours very truly,

G. A. ADAMS, *Clerk.*"

"UNITED STATES OF AMERICA, } *ss.*
Territory of Alaska. }

I, John Petrich, being duly sworn, upon oath depose and say, that I am one of the Judges of Election of the Deering Voting Precinct, Territory of Alaska, for the Election of Nov. 7th, 1916;

That the Election Papers used at that Election were all made by the judges for the reason that the regular official Ballots did not arrive in Deering in time for said Election, and I am informed that they did not arrive for about two weeks thereafter.

JOHN PETRICH.

Subscribed and sworn to before me this 2nd day of Feb., 1917.

ALFRED S. KEPNER,

(SEAL.) *Notary Public for the District of Alaska.*

My Commission expires May 12, 1918.

I hereby certify that I was a Judge of Election at Deering on

Nov. 7th, 1916, and have read the above affidavit, and the facts therein are true.

ALFRED S. KEPNER.

Endorsed:

Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome, Feb. 12, 1917.

G. A. ADAMS, *Clerk.*

By ....., *Deputy.*"

"We, the undersigned Judges of Election, held the 7th of Nov., 1916, at the Utica Voting precinct, in the Fairhaven Recording district, hereby certify that at the time of said election there had been no ballots received, and Mr. Kepner of Deering had the form of ballots telephoned from Candle and repeated it to the Utica and we wrote the ballots, using the form as we received it.

JAMES W. BLACK,
F. G. HENRY,
J. A. CHIDESTER."

"UNITED STATES OF AMERICA, } *ss.*
District of Alaska. }

On this 18th day of January, A. D. One Thousand Nine Hundred Seventeen, personally came before me, Thomas P. Roust, a Notary Public in and for said District, the within-named James W. Black, F. G. Henry, J. A. Chidester, to me personally known to be the identical persons described within and who executed the within instrument, and acknowledged to me that they executed the same freely, for the uses and purposes therein mentioned.

Witness my hand and seal this 18th day of January, 1917.

THOMAS P. ROUST,

(SEAL.) *Notary Public in and for the District of Alaska.*

My Commission expires Sept. 9, 1917.

Endorsed:

Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Feb. 12, 1917.

G. A. ADAMS, *Clerk.*

By ....., *Deputy.*"

"UNITED STATES OF AMERICA,
District of Alaska,
Second Division. } *ss.*

I, G. A. Adams, Clerk of the District Court, for the District of Alaska, Second Division, do hereby certify that I have compared the foregoing copy with the original Affidavit and Certificate of Judges of Election, Deering and Utica Voting Precincts, covering the matter of using special ballots at General 1916 Election, now on file and of record in my office at Nome, in the District of

Alaska, and the same is a true and perfect transcript of said original and of the whole thereof.

Witness my hand and the seal of said Court this 12th day of February, A. D. 1917.

(SEAL OF COURT.)

G. A. ADAMS, *Clerk.*
By W. C. MCGUIRE, *Deputy.*

Endorsed:

In the District Court for the District of Alaska, Second Division. Certified copy of certificate and affidavit of Judges of Election, Deering and Utica Voting Precincts, covering the matter of using special ballots at General 1916 Election."

"TERRITORY OF ALASKA,

Governors Office,

Juneau.

UNITED STATES OF AMERICA, } *ss.*
Territory of Alaska. }

I, J. F. A. Strong, Governor of the Territory of Alaska, and Chairman of the Territorial Canvassing Board, hereby certify that the foregoing is a full, true and correct copy of the original letter of transmittal dated February 12, 1917, signed by G. A. Adams, Clerk of the District Court, Second Division, Nome, Alaska, and of the certified copy of Affidavit of John Petrich and certificate of Alfred S. Kepner, Judges of Election, Deering Voting Precinct, and certificate of the Judges of Election of the Utica Voting Precinct, Second Division, Alaska, in the matter of using special ballots in the General 1916 Election in the precincts named.

I further certify that the original of said letter, with the certified copies of the documents therein referred to, as above enumerated, was received at the Governor's office on the 4th day of April, 1917, and that the same is now on file in said office, with the election returns of the General 1916 Election.

Witness my hand and the seal of the Territory of Alaska this 4th day of April, A. D. 1917.

J. F. A. STRONG,
Governor of Alaska, Chairman of Territorial Canvassing Board.

(SEAL.)

Attest:
Charles E. Davidson,
Ex-officio Secretary of Alaska."

No certificate was received from either Choggiung or Nushagak, but the reason was well known to the Board of Canvassers and to Judge Jennings. The fact was the Territorial or so-called official ballots were not received at either Choggiung or Nushagak before the election, though they were duly forwarded in the United States mail in time to be there before election day, but the mails were not carried there after

their deposit in the post office by the Clerk of the Court at Valdez, Alaska. The following copy of an official statement from the Post Office Department shows why they were not so received by the election officers before the election:

"POST OFFICE DEPARTMENT.

Second Assistant Postmaster General.

Washington, April 7, 1917.

HON. JAMES WICKERSHAM,
House of Representatives.

My dear Mr. Wickersham:

Referring to your personal inquiry today, I have the honor to inform you that the mail service authorized for Nushagak, Dillingham, and other points on Bristol Bay, Alaska, consists of one round trip a month from May 1 to August 31 on steamboat route No. 78070, Seward to Nushagak, and three round trips between November 1, 1916, and March 31, 1917, by carrier on emergency route No. 78235, Dillingham by Nushagak and Naknek to Cold Bay (n.o.).

The last trip by boat of the season of 1916 on route No. 78070 arrived at Nushagak August 31, 1916. There was no further service authorized until the beginning of the winter period November 1st. The carrier under that authorization left Dillingham on his first trip December 1, 1916, and departed from Cold Bay (n.o.) January 8, 1917, without carrying any mail, because of the fact that the mail steamer on the route between Seward and Unalaska was unable owing to weather conditions to effect a landing at Cold Bay (n.o.). According to reports, the first mail delivered on the route during the winter season of 1916-17 reached Dillingham February 8, 1917.

It is very difficult for the mail steamer to make a landing at Cold Bay (n.o.), and it appears that the consequent irregular service on the connecting route from Dillingham to Cold Bay (n.o.) cannot be avoided.

Very truly yours,

OTTO PRAEGER,
Second Assistant Postmaster General."

The further fact is that these precincts are so isolated during the winter months that no certicate has yet been received—and none is necessary.

Judge Jennings knew all the foregoing facts in explanation when he ordered the returns from those precincts rejected for the want of a certificate of explanation.

(11) THIRTY-SEVEN NON-RESIDENT SOLDIERS VOTED FOR SULZER.

The record shows, without any reasonable doubt, that 33 enlisted

men in the United States Army posted at Fort Gibbon precinct, Alaska, and 4 posted at Fort Egbert, Eagle precinct, Alaska, voted for Sulzer at said election. These 37 votes were returned, canvassed, compiled and counted for Sulzer, and ought therefore, to be subtracted from his total vote.

Section 3 of the Act of Congress entitled "An Act providing for the election of a Delegate to the House of Representatives from the Territory of Alaska," approved May 7, 1906, 34 Stat. L., 169, provides the qualifications of electors at such election as follows (italics mine):

> "Sec. 3. That all male citizens of the United States twenty-one years of age and over *who are actual and bona fide residents of Alaska, and who have been such residents continuously during the entire year immediately preceding the election*, and who have been such *residents* continuously for thirty days next preceding the election *in the precinct* in which they vote, *shall be qualified to vote for the election of a Delegate from Alaska.*"

The record in this case shows that all the said 37 enlisted men were so enlisted in some of the States, and came into Alaska as soldiers in the Army. True, 8 of those at Fort Gibbon are shown to have enlisted in Alaska, but they were discharged one day and re-enlisted the next day, and there was, therefore, no space of time when they were not regularly enlisted men in the Army. The sole question is: Can an enlisted man in the regular Army coming into Alaska, and then constantly under orders from his superior officers, acquire the status of an elector? Can non-resident enlisted men in the regular Army who have been stationed at a military post or in government service for more than a year in Alaska vote?

Certainly not, and the reason is, they are not "*actual and bona fide residents of Alaska, and who have been such residents continuously during the entire year immediately preceding the election.*"

The authorities defining the meaning of the word "resident," leave no doubt on that inquiry. The Supreme Court of the United States in the case of Penfield v. Chesapeake R. R. Co., 134 U. S., 531, has gathered the authorities to its satsifaction. Referring to the case of Frost v. Brisbin, 19 Wend., 11, 14, the court in the Penfield case says (p. 357):

> "The court, speaking by Chief Justice Nelson, said that if the case turned upon the defendants formed intention and purpose of mind, and not upon the fact of actual residence, the law was for him. But upon a review of former decisions, construing statutes regulating the rights and remedies of creditor and debtor, he said:
>
> 'The cases cited above establish that the transient visit of a

person for a time at a place does not make him a resident while there; that something more is necessary to entitle him to that character. There must be a settled, fixed abode, an intention to remain permanently at least for a time for business or other purposes, to constitute a *residence* within the legal meaning of that term.'"

There are two elements which must concur in making one a "*resident*, (1) the *fact* of actual residence, and (2) the *intention* to reside there. On this latter element the court said in the Penfield case (p. 357-8):

"After observing that upon the facts it must be assumed that the defendant commenced an actual and permanent residence in Milwaukee in the spring of 1836, but that since that date he had resolved to close his business there as soon as it could be conveniently done, and return to his former residence, the court said:

'Has this change of intention worked a change of residence? for this is the most that can be pretended. If our exposition of the term in the statute is correct, it clearly did not. His actual residence is still at Milwaukee. He is still carrying on his business there, and may continue it for such time as he pleases. Change of mind may lead to change of residence, but cannot with any propriety be deemed such itself.'"

And again in Barney *v.* Oelrichs, 138 U. S., 529 (536), the Supreme Court approved its former definition and concluded (italics mine):

"We hold that the residence out of the State which operated to suspend the running of the statute under Section 100 as originally framed, *was a fixed abode entered upon with the intention to remain permanently*, at least for a time, for business or other purposes, and as there was no evidence tending to establish such a state of fact here, the judgment must reversed."

The word "resident" is thus defined in Am. & Eng. Ency. of Law, 2nd Ed., Vol. 24, p. 694, and the authorities cited in its support:

"A resident of a place is one whose place of abode is there, and who has no present intention of removing therefrom."

The courts of Alaska have given the same meaning to the word and followed that given by the Supreme Court of the United States. In Terrill v. Terrill, 2 Alaska, 475 (478), the court said (italics mine):

"Residence means a place of abode and within the meaning of this statute it is the place where he resides. In Wisconsin, under the statute requiring that 'the plaintiff shall have resided in this State one year immediately preceding the time of' applying for a divorce, the plaintiff must have, in *fact* and in *intent*: an established home in the State for the preceding year; a place where he lives and has an abode; where he would be liable to taxation;

where service of process of court could be served upon him by copy; and where he has an actual habitation and residence. Hall v. Hall, 25 Wis., 600, 608. In Illinois the statute provides that no person shall be entitled to a divorce who has not resided in the State one year, and the Supreme Court of that State held this meant that there must be a fixed abode there, and the intention of remaining, at least for a time, for business or other reasons not solely connected with the suit for divorce. Chapman v. Chapman, 129 Ill., 386; 21 N. E., 806."

And the same Alaska court, in White's Guardian v. Martin, 2 Alaska, 495 (500), said:

"One 'resides' in a place when he lives or dwells there; when it is his settled abode; his habitation; his home. There must be a settled, fixed abode, an intention to remain permanently, at least for a time, for business or other purposes, to constitute a 'residence' within the legal meaning of that term. Barney v. Oelrichs, 138 U. S., 529, 533; 11 Sup. Ct., 414; 34 L. Ed., 1037. There are two necessary elements in the definition: (1) the presence of the person in the place, and (2) the intention to live there."

The courts all agree that to constitute one a "resident" of a particular place he must (1) be actually there, (2) with the intention of residing or remaining there. Am. & Eng. Ency. of Law, 2nd Ed., Vol. 10, p. 598. There must be both the *fact* and the *intent*, to constitute one a resident. Hence enlisted men in the Army, who are ordered to some post in Alaska, and who are ordered away again by their superior officers, can not acquire any legal residence there while in such service. True they meet the first requirement by actual presence at the place, but they are there by the command of a superior officer, and move at his command and they can not have or exercise any intention of remaining while in such service nor until after their discharge from the Army. During that period they are temporary sojourners at or on a military reservation, liable to be removed at any moment by their commander. Their intention is not considered, and has no legal existence.

In California it has been held:

"Presence in the State more than six months and in the county more than thirty days, under orders as a soldier in the military service of the United States, does not by itself entitle a person to be registered as a voter. Mere presence as a soldier of the United States, in obedience to military orders, does not make a residence, in the sense of the Constitution and laws in relation to the elective francise." Devlin v. Anderson, 38 Cal., 92.

A man who has enlisted as a member of the Marine Corps of the United States Navy acquires no residence in the election district

wherein the marine barracks are located. In re Green, 5 Fed. Rep., 145

In an early case in Congress, where there was no special provision against the right of soldiers to gain a residence, it was held that one did not gain the right to vote by being stationed at the place in a garrison. Biddle v. Wing, Cl. & H. El. Cas., 504.

The well recognized rule of law * * * is this: That the fact that an elector is in the Army does not disqualify him from voting at his place of residence; but he cannot acquire a residence so as to qualify him as a voter by being stationed at a particular place while in the service of the United States. Wigginton v. Pacheco, 45th Cong., 1 Ells., 12. See a Historical and Legal Digest of Contested Election Cases, Rowell, p. 819, 822.

The legislature of Alaska, in the Act of 1915, attempted to provide a rule for the protection of Alaskan residents who enlist in the Army or Navy, or the Civil Service of the United States, and who are necessarily obliged to absent themselves from the Territory. That Act attempts to save the residence of such persons in the following clause in Section 22:

> *"and provided further ,that no person shall be deemed to have lost his resdience by reason of his absence while in the Civil or Military service of the Territory, or the United States."*

That seems to be a general rule in all the States and former Territories, and is a sound reason why such men from other States are not to have the voting franchise in Alaska, for they have the right reserved to them in the place of their residence when they enlisted.

Sections 1859 and 1860, U. S. Rev. Stat., 1878, fix the general qualifications of electors in Territories. While these sections were enacted many years ago, and are therefor subject to the 3rd section of the Act of May 7, 1906, establishing the qualifications of voters in Alaska, yet the third sub-clause in Sec. 1860 prohibits the Legislature of Alaska, even if it might otherwise be thought to have authority, from permitting non-resident soldiers to vote. The sections authorize the legislature to prescribe the qualifications of voters in a Territory:

> "subject, nevertheless, to the following restrictions on the power of the legislative assembly, namely:
>
> * * * * * * *
>
> "Third, No officer, soldier, seaman, mariner or other person in the Army or Navy, or attached to troops in the service of the United States, shall be allowed to vote in any Territory, by reason of being on service therein, unless such Territory is, and has been for the period of six months, his permanent domicile."

Now, of course, the Legislature of Alaska has not attempted to ex-

tend the voting franchise to any such soldier, and could not if it did, for Congress reserved the power in Sec. 5 of the Act of Aug. 24, 1912, creating the Legislature to fix the qualifications of voters. But the foregoing is a statutory denial of the right of any such enlisted man to vote in a Territory, *even if authorized by the Legislature*, until six months after his discharge and the establishmnet of "his permanent domicile" or home in the Territory.

On the general question the Judge Advocate General of the Army has clearly established the correct rule of law. In "Digest of Opinions of the Judge Advocate General of the Army," by Howland, 1912, at pages 976 et seq., that officer has established the rule of "residence" for officers and men in the Army:

> "In the case of an officer or enlisted man in the military estab lishment, *held* that his domicile during his continuance in the service is the domicile or residence which he had when he received his appointment as an officer or entered into an enlistment contract with the United States. This is true whether such domicile was original, i.e., established by nativity, or by residence with the requisite intention, or derivative, as that of a wife, minor, or dependent. This residence or domicile does not change while the officer remains in the military service, as his movements as an officer are due to militray orders; and his residence, so long as it results from the operation of such orders, is constrained, a form of residence which works no change in domicile." Graham v. Com., 51 Pa. St., 258; Wood v. Fitzgerald, 3 Ore., 568; G. O., 13, First Mil. Dist., 1868; Taylor v. Reading, 4 Brewst, 439; Devlin v. Anderson, 38 Cal., 92. "*Soldiers of the United States do not acquire or lose their residence by reason of being stationed in the line of duty at any particular place, no matter how long their occupancy of such place may continue.*" Mead v. Carrol, 6 D. C., 338; People v. Holden, 28 Cal., 123; Hunt v. Richards, 4 Kans., 459; Brewer v. Linnaeus, 36 Maine, 428; Tibbetts v. Townsend, 15 Abb. Prac., 221.
>
> "An officer who has resided elsewhere cannot make a certain place his residence by merely declaring that it is so, or that he has elected it to be such. He must take some definite action indicating an intention and an ability to permanently remain, such as providing himself with a dwelling there, removing his family there, entering into business there, etc., to constitute the place designated his legal residence or domicile in law."

For the want, then, of any such residence as is required by Sec. 3 of the Act of May 7, 1906, that these soldiers in Alaska were "*actual bona fide residents of Alaska, and who have been such residents continuously during the entire year immediately preceding the election,*"

they were not legal voters, and when they were challenged and made oath to their several qualifications they committed perjury and ought to be punished as is provided by law. Not being "actual bona fide residents of Alaska," their votes cast for Sulzer should be subtracted from his total.

Wherefore contestant appeals to this Committee and to the House of Representatives to credit him in said canvass and compilation with the said sixty-nine votes so rejected from said canvass and compilation of the returns of the said election in Alaska, by the mandate of said court, and reject all votes cast by soldiers and other non-voters, and upon such correction of vote to declare that contestant received the greatest number of votes of any candidate for Delegate from Alaska at said election so held in said Territory of Alaska on said November 7th, 1916, and to be duly elected Delegate from Alaska for the term beginning on March 4, 1917, and that Contestant be allowed in full all his expenses necessarily incurred in making this contest.

JAMES WICKERSHAM,
Contestant.

LIBRARY OF CONGRESS
0 028 001 737 1